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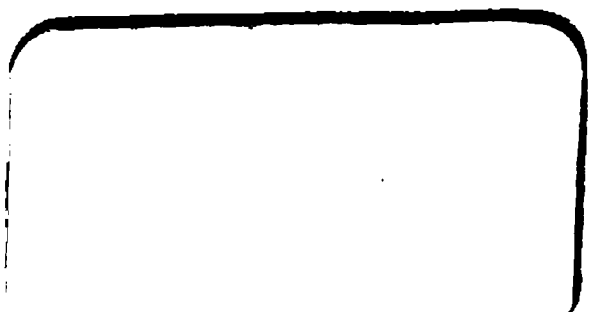
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A  
TREATISE  
ON THE  
NATURE, PRINCIPLES AND RULES  
OF  
CIRCUMSTANTIAL EVIDENCE,  
ESPECIALLY THAT OF THE  
*Presumptive Kind, in Criminal Cases.*

BY  
ALEXANDER M. BURRILL,  
COUNSELLOR AT LAW,  
*Author of the New Law Dictionary and Glossary, Law and Practice  
of Voluntary Assignments, &c., &c.*

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In the clerk's office of the District Court of the United States for the Southern  
District of New York.

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## P R E F A C E.

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In designating the subject of the following work on its title-page, both the terms "circumstantial" and "presumptive," it will be seen, have been employed. This has been done with a view to greater expressiveness, though at the expense of brevity, and, perhaps, of something approaching the character of repetition. To a certain extent, both terms convey the same idea. Strictly considered, however, "circumstantial" is the more comprehensive epithet, (circumstantial evidence always including presumptive as a species,) besides being the one by which this kind of evidence is almost exclusively designated in popular language. On the other hand, it is the *presumptive* species of circumstantial evidence which is found, in practice, to constitute its most important variety, and has called forth almost all the discussion and elucidation which have been bestowed on the subject. The term "presumptive," moreover, expresses, on its face, and in its composition, the great radical idea and principle upon which the evidence is applied, which "circumstantial" does not. These considerations have led to the use of both terms, as already explained.

The principle of *presumption*, founded, as it is, in the



structure of the human mind and its adaptation to the phenomena of the external world, has, in all ages and in all systems of evidence, natural or judicial, been recognized as an appropriate and adequate, no less than as a necessary instrument for the development of desired but unknown truths. But the most important sphere of its application has always been as an instrument of *judicial* inquiry, and, particularly, as a means of discovering *crimes* and detecting and punishing their authors.

In the Roman law, the recognition of this principle expressly appears in several passages of the Digest and Code, (*a*) and the civilians have not only expanded the ideas derived from this source, in commentaries on particular titles of these collections, but have embodied their views and arguments in distinct and, in some instances, extensive and elaborate works (*b*).

In England, the subject has not, until within a comparatively recent period, been treated in a judicial point of view, with much minuteness or method. Mr. Bentham was among the earliest writers to perceive its importance and comprehend the range of its application; and the fifth book of his "Rationale of Judicial Evidence" contains a valuable collection of facts and principles, of which later writers have largely availed themselves. In the well known and deservedly esteemed treatises of Mr. Starkie and Mr. Phillipps, especially the former, the subject is clearly and instructively treated at considerable length. And, more recently, it has received particular and exclusive illustration in the excellent treatises of Mr. Best and Mr. Wills, both of which have been

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(*a*) *Dig.* 22. 8. *Cod.* 4. 19. 25.

(*b*) See the treatises of Alciatus and Menochius on Presumptions.

re-printed in the United States. No American work, however, on a plan similar to those of the publications just mentioned, has yet appeared, notwithstanding the accumulation of much valuable matter available for the purpose ; although the leading ideas and principles applicable to the subject have been ably presented by Professor Greenleaf, and many important facts and views are to be found in the American Notes to the late editions of Phillipps on Evidence.

It was supposed that a work composed on a considerably broader basis of fact than has yet been adopted,—presenting the elements or materials of the evidence with as much of that minuteness which the term “ circumstantial ” itself implies, as might be practicable, and exhibiting not only the *principles* upon which they are applied to the purposes of proof, but also, to some extent, the *process* of applying them,—would not be unacceptable to the profession or the public. Under this impression the following work was undertaken, the plan of which it now remains to describe.

The whole matter is comprised in two parts. In the first of these, which is introductory to the other, after some elementary explanations of the nature of evidence, a considerable space is devoted to the illustration of the principle of presumption as founded in nature, and the manner in which it is applied to the development of truth in matters of science, as well as in ordinary life. This is followed by a general view of the nature and operation of circumstantial evidence, as an instrument of judicial investigation in criminal cases ; presenting, first, the object of inquiry or fact sought ; next, the facts which are to constitute a basis for the inferences by which it is to be reached ; next, the process of inference itself ; and finally, the conclusion arrived at, or verdict given.

In the second part, the subject is considered exclusively in a judicial point of view, and is treated in detail, with as much minuteness as the limits of the work would allow. The order adopted is the natural one; presenting, first, the elements or materials of which the evidence is composed, and, next, the manner in which they are applied to the purposes of proof; with the principles and rules governing such application. Under the first of these heads, a large number of facts has been brought together and classified under convenient divisions. Nearly all these facts, (especially those of the criminative class,) have been extracted with considerable labor from cases of actual occurrence, which are minutely referred to throughout; thus furnishing a digest or repository of useful matter, not otherwise easily accessible.

The whole work, although chiefly intended for professional use, has been composed with a considerable reference to more extensive circulation. The subject itself is, indeed, distinguished from most others of a judicial character, by the attraction which it has always been found to possess for the popular mind. There are few occurrences in a community which create a more widely diffused interest than the commission of *crimes*, especially those of a high grade of enormity; and of all these cases, those are always found to take the strongest hold of popular sympathies, which require to be made out by *circumstantial evidence*. It is precisely that state of things which calls for the employment of this great instrument of inquiry, which presents all the elements and conditions for producing and working up to its highest pitch, this species of mental emotion and impression. It is the characteristic fact,—with which investigation in these cases usually sets out,—that both the crime and the

criminal are *unknown*, and are to be brought to light out of a mysterious obscurity, by a gradual process, which attracts and holds with a constantly increasing power, the attention of thousands. More specific sources and elements of interest are found in the circumstances which generally attend trials for high crimes by this species of evidence ;—in the unusual concourse of witnesses, the immense number of facts elicited by their testimony, the laborious minuteness with which the investigation is prosecuted, the great length of time consumed in the process of proof ; and in addition to all these, the consideration that this process is, throughout, a natural one, unembarrassed by technicalities either of rule or reasoning, and such as the mind of every intelligent and attentive observer and spectator can, without much difficulty, comprehend and follow.

But there is still another consideration which gives to the interest naturally awakened by investigations of this kind, a far graver cast than that of mere curiosity or temporary excitement of feeling, however strong ; namely, the possibility, (common to numbers in every community) of being brought into that intimate connection with the process of trial which is involved in the responsible character of *juror*. The importance of this office,—the great characteristic duty of which consists in the interpretation of facts in evidence, cannot, especially in capital cases, be over-estimated ; nor will it be denied that every individual called to assume it should be furnished with every legitimate means for enabling him to discharge it with intelligence and effect. As the practice is, on trials for crimes by evidence of the circumstantial kind, the jury are usually instructed by the court,—sometimes at considerable length—in the nature of

such evidence, and the rules which are to be observed in applying it. The value of these judicial expositions is obvious ; neither will it be questioned that they are most likely to be effective upon minds which have been prepared by some previous acquaintance with the subject.

It is with a view to supplying a source of information to readers of the class just indicated, that a considerable portion of the present volume has been written ; and that a space unusually (and, perhaps, in the opinion of some, unnecessarily) large, has been devoted to statements of the materials of evidence, and illustrations of the manner in which such materials are practically applied. A leading object, throughout, has been to exhibit the process of proof by circumstances in as much of the character of system as its nature admits, by a constant reference to the *principles* which lie at its basis, and to the *rules* which judicial experience has established or approved for its regulation. A convenient summary of these rules will be found in the concluding chapter.

It was the author's original intention to have appended to the work a selection of *criminal cases*, and considerable progress has been made in this part of the undertaking. But the time unexpectedly consumed in carrying the body of the volume through the press has induced its postponement to a future occasion.

NEW-YORK, *June* 19th, 1856.

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# CIRCUMSTANTIAL EVIDENCE.

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## PART I.

### GENERAL OR INTRODUCTORY VIEW.

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#### CHAPTER I.

##### EVIDENCE IN GENERAL.

“THE word *evidence*,” observes an American jurist, “in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.” (a) Considered with reference to its derivation, it is that which *serves to make clear*, or evident, the truth of an alleged fact. (b)

Evidence may otherwise be concisely defined, by distinguishing it from the term “proof,” with which it is sometimes confounded. (c) Evidence is not proof, but the medium of proof; proof is the effect or result of evidence. (d) “Proof,” in the words of an English writer on the subject, “is the perfection of evidence; without evidence there can be no proof, although there may be evidence which does not amount to proof. Take the case, for instance, of a man

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(a) 1 Greenleaf on Evidence, § 1. See Wills on Circumstantial Evidence, 1, 2.

(b) See note (a) on next page. Sir *William Blackstone* has defined evidence in more absolute terms, as “that which demonstrates, makes clear or ascertains the truth” of a fact or point in issue. 8 Bl. Com. 367. But this, as will be seen in the text, is rather the definition of *proof*.

(c) See 8 Bl. Com. 367.

(d) 1 Greenl. Evid. § 1. Wills on Circ. Evid. 2.

found murdered at a spot towards which another had been seen walking, a short time before ; this fact would be *evidence* to show that the latter was the murderer, but, standing alone, would be far from *proof* of it." (a)

Evidence has been well described as a relative term, having no complete signification of itself, and presenting no complete idea to the mind, unless in connection with the object to which it necessarily relates. (b) That object is *fact*, or *matter of fact*. Hence the idea of fact is inseparable from that of evidence. Facts have been called "the necessary subject matter of evidence ;" (c) its component materials ; (d) and, in short, evidence has been defined in so many words, as matter of fact itself. (e)

Evidence, in a legal point of view, may be considered as the statement or presentation to a judicial tribunal, of one or more matters of fact, in a proper form to be used in the investigation of some other matter of fact, the existence of which is questioned, and which is intended to be made the basis of a decision. (f) In such investigations, there are

(a) Best on Presumptions, § 6. The term "evidence," in this sense, is considered by Mr. Best to be peculiar to the English law. The Latin *evidentia* and French *évidence*, when used by foreign jurists, he observes, are rather intended to designate clearness or fullness of conviction. *Id. ibid.* note ; citing Mascardus de Prob. lib. 1, quæst. 8 ; Domat, Lois Civiles, liv. 3. tit. 6. And see Burlamaqui, Principles of Natural and Politic Law, part 1, ch. 1, sec. 9. Evidence, in the latter sense, is properly the *state* or quality of *being evident*, that is, clear, manifest, open to view ; (Lat. *e*, out, and *videre*, to see,) which, indeed, is the true radical meaning of the English word. Johnson's Dict.

The Latin *probatio*, commonly translated by the English word "proof," is frequently used by the civilians, to designate direct evidence, in contradistinction to *præsumptio*, *argumentum*, &c. J. Voet ad Pand. lib. 22, tit. 8, n. 15 &c. Best on Pres. § 4, note.

(b) 1 Bentham's Rationale of Judicial Evidence, 17, 89.

(c) *Id. ibid.*

(d) 1 Starkie on Evidence, 14, 15.

(e) 1 Benth. Jud. Evid. 17. 24.

(f) Mr. Starkie has defined evidence to be "that which is legally submitted to a jury, to enable them to decide upon the questions in dispute, or issues as pointed out by the pleadings, and as distinguished from all comment and argument." 1 Stark. Evid. 8, 9.

always two general descriptions of facts involved: first, the facts which are the ultimate objects of the inquiry, and respecting the existence of which, a definite belief or persuasion is required to be formed; and, secondly, the facts which are immediately presented by the evidence, and the effect, tendency or design of which is to produce such belief or persuasion. (a) The former of these may, from their superior importance and prominence, be distinguished as *principal* facts; the latter may be designated as evidencing or *evidentiary* facts, and, where they actually have the effect of producing the degree of persuasion desired, as proving or *probative* facts. (b) Evidentiary facts, thus connected with principal facts, constitute what will presently be described as circumstantial evidence. (c)

The principal facts which it is the object of the investigation or trial to prove by evidence, are always formally put *in issue* between the contending parties, by pleadings framed for the purpose; and, in civil cases, there frequently are several of these facts or issues presented, at once, for proof and determination. In criminal cases, however, there is but

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(a) Mr. *Bentham* has defined evidence, in general, to be "any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce a persuasion therein, affirmative or disaffirmative of the existence of some other matter of fact." 1 *Jud. Evid.* 17, 18. This definition has been adopted by Mr. *Best*, in his "Treatise on Presumptions and Presumptive Evidence," p. 7, § 6.

(b) This distinction, together with the terms used to express it, is taken from the work of Mr. *Bentham*, already cited. 1 *Jud. Evid.* 18, 40. 3 *Id.* 2, 3. The terms themselves belong to a numerous class, coined by that eccentric writer, in characteristic disregard of authority, and with a sole view to convenience of expression. Some of these are extremely uncouth, besides being, in fact, uncalled for: such as "disprobabilize," "clandestinity," "jactitential," and the like. Others are less objectionable, and of this number are "evidentiary," "probative," and "infirmative." As the latter epithets possess the undoubted merit of expressing certain necessary ideas with much precision, they have been adopted and freely used by late writers of authority on the subject of presumptive and circumstantial evidence. *Best on Pres.* § 6, *et passim*. *Wills, Circ. Evid.* 22, 85.

1 *Benth. Jud. Evid.* 60.



one ultimate principal fact to be proved,—the guilt of the accused ; but one issue to be tried,—that of guilt or innocence.

Evidence, as thus presented for the consideration of courts of justice, is of two kinds ; direct and indirect. (*a*)

*Direct* evidence, (or *positive* evidence, as it is sometimes called, (*b*) ) is that which is applied to the fact to be proved, or principal fact, immediately and directly, and without the aid of any intervening fact or process : (*c*) as where, on a trial for murder, a witness positively testifies that he saw the accused give the mortal wound, or administer the poison. Here, the fact of the killing, which is sought to be proved, is the very fact testified to ; it is contained, as the civilians express it, in the testimony itself, (*d*) and needs no process of special inference to make it appear. The moment the testimony is given, if it is believed, the fact, (so far as the affirmative of the issue is concerned,) is considered to be proved. (*e*)

*Indirect* evidence (called by the civilians, *oblique*, (*f*) and more commonly known as *circumstantial* evidence) is that which is applied to the principal fact, indirectly, or through the medium of other facts, by establishing certain *circumstances* or minor facts, already described as evidentiary, from which the principal fact is extracted and gathered by a process of special inference : (*g*) as where a witness testifies

(*a*) 1 Stark. Evid. 446, 454. The civilians have adopted a similar division. *Omnis nostra probatio aut directa est, aut obliqua.* Vinnius, Jurispr. Contr. lib. 4, c. 25.

(*b*) 1 Stark. Evid. 18. Theory of Presumptive Proof, 17. 1 Greenl. Evid. § 18.

(*c*) 1 Benth. Jud. Evid. 41, note. 1 Greenl. Evid. § 18.

(*d*) Directa, [*est probatio*] *cum id quod probare volumus, ipsis tabulis aut testimoniis continetur.* Vinn. Jurispr. Contr. *ubi supra*.

(*e*) 1 Greenl. Evid. § 18. See Wills Circ. Evid. 18.

(*f*) Vinnius Jurispr. Contr. *ubi supra*.

(*g*) 3 Benth. Jud. Evid. 2, 5. *Probatio obliqua est, cum id quod intendimus ex tabulis aut testimoniis argumentando colligitur.* Vinn. Jurispr. Contr. *ubi supra*.

that he sold a deadly weapon, or poison to the accused, shortly before the murder ; or that he saw him in the immediate vicinity of the place where the crime was committed, at or near the time of its commission. Here, it is not sufficient merely to present the facts themselves, and to prove them, though ever so clearly. They must be actually connected with the fact sought, and this is effected by an intermediate process of reasoning or inference, in which the faculty of judgment is called into exercise, and which is commonly known as *presumption*. (a)

Thus, the characteristics of indirect or circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more facts of the class described as *evidentiary* ; (b) and, secondly, a process of *special inference*, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth. (c) Hence it has been very significantly

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(a) See the next chapter. According to Mr. *Starkie*, evidence is either direct and positive, or presumptive and circumstantial. "It is direct and positive when the very facts in dispute are communicated by those who have had actual knowledge of them by means of their senses, and where, therefore, the jury may be supposed to perceive the fact through the organs of the witness. It is presumptive or circumstantial, where the evidence is not direct; but where, on the contrary, a fact which is not directly and positively known, is presumed or inferred from one or more other facts or circumstances which are known." 1 *Stark. Evid.* 18. In this explanation, it will be seen, there is no reference to documentary evidence. This has been observed by an accurate writer, who distinguishes the two species of evidence in the following clear and comprehensive terms: When the witness or document attests the very fact to be proved, (as when a man proves the making of a promissory note by the defendant, who denies that he made it; when a man states that he was stabbed by the prisoner who is indicted for the stabbing; or the date of a man's death is proved by a monumental inscription or an entry in a parish book;) the evidence is said to be positive or direct. But if the witness or document attests, not the fact to be proved, but something from which that fact may be inferred, the evidence is said to be presumptive or indirect. 6 *London Law Magazine*, 358, 359. And see *Best on Pres.* § 186.

(b) See *ante*, p. 3.

(c) In the case of direct evidence, also, it has been said, there is always an

called in Scotch jurisprudence, *argumentative* evidence. (a)

In a certain point of view, or up to a certain point of the procedure, indirect evidence is itself of a *direct* character. The minor or evidentiary facts which are relied on, as the basis of the inference required, must always be directly proved. (b) So far as the evidence goes to prove *them*, it is unquestionably and necessarily direct. But in giving characteristic names to these species of evidence, we are to consider their relation to the *principal* fact, or ultimate object of the investigation, and not to any thing intermediate. Direct and indirect evidence both equally contemplate such a principal fact, but they arrive at it in different ways; the former by a direct course; the latter, indirectly or obliquely; that is, through other facts. (c)

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evidentiary fact presented, but it is throughout of a uniform description, namely, the existence of a person appearing in the character of a witness, and asserting the existence of the principal fact, on the ground of its having, in some way or other, come within the cognizance of his perceptive faculties. 8 Benth. Jud. Evid. 4. So, it has been said, there is inference always made use of in the application of direct evidence, but it is of a *general*, not a special kind; it is that general inference by which, from the mere statement of the witness, asserting the existence of a fact, the existence of that fact is inferred and credited. *Id.* 2. This takes place where the evidence is purely direct, in the strictest sense. As to inference, as an actual ingredient in much that is called direct evidence, see *post*.

(a) Trial of *James Stewart*, (*Mackintosh* arg.) 19 Howell's State Trials, 83. The equivalent term "inferential" has been used in a late American case. *Commonwealth v. Harman, Gibson*, C. J. 6 American Law Journal, 128.

(b) 1 Stark. Evid. 501, 502.

(c) Mr. *Wills* has objected to the use of the term "indirect," as applied to circumstantial evidence; contending that that species of evidence is of a nature identically the same with direct evidence. According to his view, the evidence itself is always direct, it is the *facts* immediately proved by it, which are indirect, as applicable to the particular subject of enquiry. *Wills* on Circ. Evid. 15, 16. Whatever may be said of this distinction, it seems clear, that the evidence, as it comes from the witness, is always intended to establish two successive results; one, immediate,—the existence of the fact directly testified to; the other, ultimate,—the existence of the principal fact. It is manifestly with a *leading* reference to this *latter* object, (though at the time comparatively remote,) that the evidence is originally presented: it is to

Indirect evidence, however, is more commonly termed, in practice, *circumstantial* and *presumptive*, both words being sometimes used indifferently, to express the same idea. (a) Strictly, the former is the more general term, and includes the latter as its species. Evidence is called *circumstantial*, from its basis or materials, as being made up, in an emphatic sense, of *circumstances*, or relative facts; and *presumptive*, from its legal effect in authorizing or raising a certain inference or *presumption*. All presumptive evidence is circumstantial, but all circumstantial evidence is not presumptive. (b)

Circumstantial and presumptive evidence are thus both clearly distinguishable from that which is direct and positive. In strictness, however, *all* evidence is presumptive, (c) that is, it suggests or requires, to make it complete, a process of *presumption*, of some kind or other. Thus, direct evidence itself always involves a general presumption of the veracity of the testifying witness, or the genuineness of the document proved. (d) Indeed, independently of this general presumption, there is very little direct evidence, which may not, on a close analysis, be found to be intrinsically composed, in a greater or less degree, of inference. The simplest, and apparently the strongest example of direct evidence, is where an eye-witness to the fact sought,—for instance, the killing of a person,—positively testifies to what he saw. But it has been well remarked, that it is seldom

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prove the *principal fact*; to prove it in the only way practicable, that is, through intermediate facts, which are merely means to the end. It is with reference to *this* fact, that the evidence seems to be, in the strictest literal sense, *indirect*; going out of the direct course; passing obliquely through intervening points.

(a) 1 Stark. Evid. 18, 481. 1 Phillipps on Evidence, 486-488, (Am. ed. 1849.) The term *indirect* is not often used in the books. Mr. *Bentham's* division is into direct and circumstantial. 3 Jud. Evid. 2.

(b) Wills Circ. Evid. 16, 17. See further on this subject, *post*, Chapter III.

(c) 1 Stark. Evid. 19.

(d) Best on Pres. § 11. 1 Stark. Evid. 19.

that any belief of any matter of fact is produced, by the exercise even of the sense of sight, but the judgment has been more or less at work in the production of it. (a) Hence it has been repeatedly said, and with reason, that almost all evidence is, in strictness, circumstantial. (b)

Other considerations, illustrative of the nature and connection of these two species of evidence, will be presented in a subsequent chapter. (c)

The expressions "circumstantial evidence," and "presumptive evidence" distinctly present the three ideas of evidence, circumstance and presumption. The nature of *evidence* has been already sufficiently explained. A *circumstance* may be shortly defined as a relative fact; circumstances, according to the etymology of the word, are certain minor facts *standing around* (*circum stantia*) a principal fact, and which, as from so many distinct surrounding points, shed a converging light upon it, as a common centre. *Presumption* is a subject requiring a much more extensive explanation, as will appear in the following chapter.

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(a) 8 Benth. Jud. Evid. 7. This idea is made the basis of some forcible remarks by Chief Justice Gibson, in his charge to the jury in the case of *Commonwealth v. Harman*, 3 American Law Journal, 128. 4 Barr's R. 272.

(b) *Id. ibid.*

(c) See *post*, Chapter V.

## CHAPTER II.

### PRESUMPTION.

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THE essential import of the term *presumption* is well indicated by its etymology,—a *taking* or assuming *in advance*. (a) Applied to evidence, the object of which is the discovery of truth, it is the *taking* of a fact or proposition to be true, *before* it is positively shown or certainly known to be so. (b) It is an act of reasoning; a mental process by which one fact is inferred from another; a process by which a fact not known is deduced from one that is known. (c)

It is, in strict propriety, a process,—the *act* of presuming rather than the *consequence* of it. The term, however, has long been extended beyond the sense of mere process, so as to include that of *result*, also. Hence its common and, in-

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(a) *Præsumptio*, Lat. from *præsumere*, to take before, (*præ*, before, and *sumere*, to take.) *Præsumere* is similar, in its composition and radical import, to *anticipare*, (to anticipate.) Calvin. Lexic. Jurid. in voc. Hence *Huberus* defines presumption to be, *anticipatio judicii*, the anticipation or preliminary formation of a judgment. Hub. Prælect. Jur. Civ. lib. 22, tit. 8, n. 14.

(b) "By a thing being presumed to be so," says *Locke*, "is meant, as the word imports, that it is *taken* to be so, *before* it certainly appears." Essay on the Human Understanding, b. 4, c. 14, s. 4. This is almost identical with the explanation of *Alciatus*: *Sumit pro vero, præ, id est, ante aliunde probetur*: (it takes a thing to be true before it is proved by other means.) Tract. de Præsa. cited in Pothier on Obligations, part 4, ch. 8, sect. 2.

(c) See the observations of *Abbott*, C. J. (Lord *Tenterden*,) in *Rex v. Burdett*, 4 B. & Ald. 95, 161. 1 Phill. Evid. 486, (Am. ed. 1849.) Roscoe's Crim. Evid. 14.

deed, prevailing signification is,—a conclusion, judgment, or belief, as to the truth of some proposed matter of fact, arrived at and formed by a process of inference. (a) It has also the further sense of assumption or *proposition*, passing finally into that of principle or *rule*. (b)

The first thing observable of presumption, is the extent of the range of its application. It is constantly employed in *science*, as a means of discovering abstract truths, or the truth of facts connected with material objects, whether such truths be actually uncertain or unknown, or assumed as such, for the purpose of discussion or inquiry. It is every day employed in *common life*, as a basis of opinion or belief respecting past, present and future events, and not only of

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(a) Some of the civilians use *præsumptio* to express a consequence or conclusion, and *argumentum*, the process of reasoning by which it is reached. *Argumenta—ex quibus oritur præsumptio*. G. A. Struvius, Jurispr. Rom. Germ. lib 4, tit. 11, n. 8. Others define it by various words, all conveying the idea of a *result*. Thus, some call it conjecture, (*conjectura*.) Heineccius ad Pand. pars iv. § 124. Others, opinion, (*opinio*.) Vinnius Jur. Contr. lib. 4, c. 86. J. Voet ad Pand. lib. 22, tit. 3, n. 14. Others, proof, (*probatio*.) Struvius, Syntagma Juris, exerc. 28, s. 15. Westenbergius, Princ. Juris, lib. 22, tit. 3, n. 21. Huberus terms it a preliminary or provisional judgment, (*anticipatio judicii*.) Præl. Jur. Civ. lib 22, tit. 3, n. 14. Domat calls it a consequence drawn from a known fact. Civil Law, part I, book 3 tit. 6, sect 4, art. I. Pothier, a judgment formed by or upon a consequence. Treatise on Obligations, part 4, ch. 8, sect. 2, p. 806. The English writers on evidence almost uniformly define presumption to be *an inference*. 3 Stark. Evid. 1284. 1 Phill. Evid. 436. Best on Pres. § 11. Wills on Circ. Evid. 17. These definitions will be more particularly considered in another place.

On the other hand, the civilian *Mattæus* defines presumption to be *argument* or reasoning, (*argumentum*.) Matt. de Criminibus, in lib. 48, Dig. tit. 15, c. 6; adopted by Best, J. in *Rex v. Burdett*, 4 B. & Ald. 124. Lord *Tenterden*, in the case last cited, called presumption, “an inferring” of a fact from other facts; “an act of reasoning.” 4 B. & Ald. 161. Professor *Greenleaf* gives to presumptions of fact the name of “mere arguments.” 1 Greenl Evid. § 44. And see 6 Lond. Law Mag. 369.

(b) These several significations of the term *presumption* are accurately distinguished in an article in the London Law Magazine, vol. vi. pp. 354, 369, 372—374.

belief, but of action. (a) And it is finally employed in *law*, as a means of arriving at the truth of facts actually and formally disputed between contending parties. It is the vital and essential principle of that important branch of evidence, which it is proposed to consider in the present work; and is therefore entitled to some distinct preliminary notice.

Presumption may be conveniently treated under two general divisions: first, as it is applied to subjects not of a legal or judicial character; secondly, as it is applied to the purposes of judicial investigation. And, for the sake of brevity, the former may be distinguished as *natural*, the latter as *judicial* presumption. Under the former, will be presented what may be termed the general principles of the subject; under the latter, such modifications as have been introduced for the more effective administration of justice.

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## SECTION I.

### *Natural Presumption.*

Natural presumption is that process of reasoning (b) which the mind of any person of ordinary intelligence is competent to exercise, and which it naturally will and constantly does exercise, in arriving at the belief of the truth of any desired fact, by the aid or through the medium of one or more other facts. The reasoning employed is of the description known as *probable*, and it is founded on the

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(a) See 1 Stark. Evid. 24, and note *ibid*.

(b) Mr. *Starkie's* view of the nature of presumption is peculiar. He calls it an inference made solely by virtue of previous experience, and *independently of any process of reason* in the particular instance. 1 Stark. Evid. 478. 3 *Id.* 1235, 1246.



ordinary and *usual course of things*, according to which, the fact known and the fact sought, or facts of the same character, have been previously known, observed or understood to be in some way *connected* together. All these ideas are very concisely combined in the definition of presumption given by the civilian Matthæus:—*argumentum verisimile, communi sensu perceptum, ex eo quod plerumque fit aut fieri intelligitur.* (a)

This kind of presumption may be more adequately explained by considering separately, (1) its object, or the fact proposed to be ascertained; (2) its source or immediate foundation, or the fact or facts from which the inference is made; (3) its general or ultimate foundation or principle; (4) its character as a process; and (5) its result and effect.

I. The fact proposed to be ascertained, or the truth of which is sought to be discovered, is always something which is not only *uncertain*, (b) but respecting which no absolute certainty can, at the time, be obtained. (c) What is desired is a *reasonable judgment* in regard to its truth, as a ground of belief. Where the truth of the proposed fact certainly appears, or can be made certainly to appear, so that actual *knowledge* can be had of it, there is no necessity, and, indeed, no room for presumption; that being, as already ex-

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(a) Matthæus de Criminibus, in lib. 48, Dig. tit. 15, c. 6. Approved by Mr. Justice Best, in *Rex v. Burdett*, 4 B. & Ald. 95, 124. Translated by Mr. Phillipps, "a probable inference which our common sense draws from circumstances usually occurring in such cases." 1 Phill. Evid. 486, 487.

(b) Domat's Civil Law, part I, b. 8, tit. 6, sect. 4, art. I. Hence Huberus aptly defines presumption to be, *anticipatio judicii de rebus incertis*. Præl. Jur. Civ. lib. 22, tit. 8, n. 14. So, Struvius defines it as *probatio negotii dubii*. Syntag. Juris. exerc. 28, s. 15. And Voet calls presumptions *opiniones de re incerta, necdum penitus probata*. J. Voet ad Pand. lib. 22, tit. 8, n. 14.

(c) See further, as to certainty, under the head of presumption, considered as a result, *post*, p. 25, *et seq.*

plained from its radical import, merely a substitute for knowledge,—something that is relied on in the absence of knowledge, and until that certainty which constitutes knowledge can be attained. (*a*) Where we do not know, we are content to presume; but where knowledge begins, presumption ends. The illustrations of this proposition are so obvious and familiar, as to occur readily to the mind, without further explanation.

II. The immediate source, foundation, or medium of natural presumption is always a fact,—sometimes several facts—having the quality of certainty, and in this respect distinguishable from the fact sought. It is something either actually known from observation, or proved, or admitted, or regularly inferred from another fact previously proved. In what may be termed *speculative* presumption, or presumption applied to the discovery of abstract or general truth, this fundamental fact is presented in an abstract form, either as a general result of previously observed facts, or as a conclusion of mere reason. But where the discovery of the truth of some particular fact is sought, with reference to some *practical* or immediate *use* to be made of it, the fundamental fact is something actually and specially proved, or known by being immediately and sensibly apparent to observation. It is not necessary, however, that the fact be of an affirmative character. It may be negative, that is, it may consist in the absence of evidence. (*b*)

The forms of presumption may be reduced to three:—from facts to other facts, as their causes; from facts to other facts, as their concomitants, (all being referable to a common

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(*a*) Best on Pres. § 8. And see the observations of Mr. Baron Mounteney, in the case of *Annesley v. Anglesea*, 17 Howell's State Trials, 1429.

(*b*) 2 Evans' Pothier on Obligations, num. 16, sect. 14, p. 280, (Phil. ed. 1858.)

cause ;) and from facts to other facts, as their effects. (a) The latter division embraces that very large class of presumptions which hourly occur in common life, where, from certain acts done, certain results are anticipated by the party doing them. In these cases, the acts done are the fundamental facts, and they are facts of the strongest and clearest possible kind, being wholly created by the party presuming, and therefore entirely and absolutely known by him.

III. The general foundation of this process of natural presumption or inference from one fact to another, is the *connection* which has previously been observed or understood to exist between them; not an occasional or fortuitous connection, but one that is referable to the operation of some general *principle* or law, which has been found to prevail in the natural or moral world, and the *permanence* of which is relied on. The fact sought is inferred from the fact known, because, in all the instances which have been observed by the party presuming or by others on whose observation he relies, it has usually, if not invariably, preceded, accompanied, or followed it.

It is here that we discover the ultimate principle of presumption, which may be said to spring from the constitution of the human mind itself, or rather from the adaptation of that constitution to the world around it. (b) There is a natural tendency or disposition in the mind to expect the recurrence of events or appearances which have frequently happened; and, where they have uniformly occurred at stated periods of time, to expect or anticipate their recurrence with corresponding regularity. This is the case even where the subject of observation is a single event or appear-

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(a) See Domat's Civil Law, part I, b. 3, tit. 6.

(b) See 1 Stark. Evid. 24, note. *Id.* 493, 494.

ance, unconnected with any other, and where no reason is known or can be given for the expectation, but the mere fact that the event has occurred before. And this constitutes the whole ground of the belief in the phenomena of external nature, in cases where not the most remote idea is entertained of their cause. The savage expects the ebb and flow of the tide, as confidently as the astronomer who can demonstrate its reason and its laws. To him, it is merely the *habit of nature*, but a habit, the undeviating uniformity of which, as observed by himself and all of whom he has ever heard, carries with it the assurance of its continuance. (a)

This kind of belief affords an example of the simplest and lowest form in which presumption can be said to exist, being rather a mental instinct or habit, than a properly intelligent act. If we go a step farther, and suppose that, instead of a *single* event or fact, *two or more* have been observed together, and, from repeated observation, have been found to present a certain connection with, or to bear a certain relation to each other; we find the same tendency in the mind to expect, anticipate, or presume, as in the former case. The observed events or appearances having been found to occur usually or uniformly *together*, it is expected that when they again occur, they will occur in the *same connection*. This may be believed, as in the former case, without any idea of the reason why the connection does and should exist. But when such reason comes to be perceived and understood, the grounds of belief become greatly enlarged and strengthened; and presumption itself, from being a mere instinctive inclination, assumes the character of an intelligent and

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(a) This is the ground upon which, according to a writer of great authority, the belief in the continuance of this particular phenomenon rests in civilized communities. "A man's having observed the ebb and flow of the tide to-day," says Bishop Butler, "affords some sort of presumption, though the lowest imaginable, that it may happen again to-morrow; but the observation of this event for so many days and months and ages together, as it has been observed by mankind, gives us a full assurance that it will." Butler's Analogy, Introd.

philosophic act. It is, in short, from these same connections, observed in repeated instances, and found to be constant and uniform in their occurrence, that the general laws which govern the physical world are first presumed, and eventually deduced; and the great leading relation of *cause and effect* comes to be perceived and understood in its full force and extent. (a)

These general principles, thus discovered by the aid of presumptive reasoning, become, in their turn, important guides to presumption itself. The law regulating the connections being known, the mind becomes more confident in the conclusions it is led to form respecting them. An event is no longer expected to occur, simply because it has been observed to occur, although the instances of such observation may be innumerable; but because of its dependence upon some law, under the operation of which, its occurrence is a kind of necessity. An appearance which has first been observed to follow uniformly after another, and then satisfactorily ascertained to have been actually produced by it, is looked forward to, as its natural, if not necessary effect. An assemblage of facts which have usually, if not uniformly, been found to occur together, is referred to some common cause or principle of association, which induces the expectation of its recurrence in the same or a similar combination.

The strength of presumption, as guided by these general laws, depends upon the degree of perfection to which the ascertainment of them has been carried. The laws regulating some of the phenomena of *external* nature, especially those which occur at regular periods, have been so thoroughly investigated and so completely tested by observation, that their results or effects are anticipated with a confidence amounting to absolute certainty. We can hardly, indeed, be said to *presume* that the sun will rise and set to-morrow, as it has done to-day, and for ages before, for our belief

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(a) See 1 Stark. Evid. 24, 25, note.

partakes rather of the character of *knowledge* than of presumption ; and yet it is knowledge which, the most intelligent will admit, rests upon the general fundamental condition that the laws of nature will *continue* to operate as they have always done ; which itself is, in strictness, a mere presumption. (a)

If we turn, next, to those phenomena of the material world which are capable of being made the subjects of *human action* or experiment, we shall find similar general laws serving as guides to the mind in the anticipations and conclusions it forms respecting them. Certain appearances and products, when found, in repeated instances, to be the uniform results of the contact or combination of certain material substances, are referred to a general law founded on their essential properties, in obedience to which, they are expected to occur in the same form, whenever the same contact or combination is again produced. The confidence, indeed, with which these results are anticipated, is of the very strongest kind, amounting, in cases where all the elements and conditions of the experiment are exactly known, to absolute certainty. Where the expected result fails to occur, such failure is always attributed to the presence of some new element, or the existence of some condition not previously perceived. Further experiments have the constant effect of detecting the exact source of the disturbance, and, by this means, of verifying with increased force the correctness of the original conclusions.

The great ultimate foundation of this whole process of

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(a) "There is, in every case," observes *Butler*, "a probability that all things will continue as we experience they are, in all respects except those in which we have some reason to think they will be altered. This is that kind of presumption or probability from analogy, expressed in the very word *continuance*, which seems our only natural reason for believing the course of the world will continue to-morrow, as it has done, so far as our experience or knowledge of history can carry us back." *Analogy*, part I, chap 1.

presumption, as applied to material objects, and the indispensable condition to any confident reliance even upon general laws, though ever so clearly established, is the expectation that such laws will *continue to operate* as they have done. In other words, it is faith in the *permanence* of the known existing order of things. It is confident belief that the essential properties of matter, and the existing relations between bodies and substances will continue to be preserved; that what has happened before will, under the same circumstances, happen again; and that like causes, under like circumstances, will produce like effects.

If we next consider presumption as applied to subjects of observation in the *moral* world,—the actions of men and the concerns of life—we shall find it to rest upon connections and associations similar to those which constitute its basis in the natural world. (a) The conduct of men has always been found to be influenced and determined by their opinions, passions and habits, and their relations to external objects; and the uniformity with which these influences have been observed to produce their results, has led to the deduction and establishment of certain general principles, similar to those by which the phenomena of external nature have been ascertained to be regulated. *Motives* and *acts* have been found to stand in the same relation to each other as *causes* and *effects*. In numberless instances, have motives been traced forward to their effects in action, and in equally numberless instances have acts been traced back to their sources in motives; and many of these observations have been practically verified in the most convincing manner. Hence a certain general correspondence and relation have been established between them, serving as a ground for inferring the one from the other. And hence, where, in a particular case, certain circumstances indicating the existence of a motive are shown, and certain other circumstances

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(a) See 1 Stark. Evid. 25, 26.

indicating a corresponding act as its result, the former is naturally assigned to the latter as its cause, and frequently becomes a most convincing element in proving it. (*a*)

But it is to be observed of these general principles of moral conduct, that they are not capable of being either ascertained or stated with the same precision as the laws of the physical world, nor are they found to operate with the same undeviating regularity; and this arises from the character of the subject itself. (*b*) For, unlike matter, which is entirely passive, inert, and invariable, under the operation of its law, mind, the great spring of moral conduct, possesses a power of independent action; and, however strongly it may be impelled, in general, to obey its law, may yet, in the exercise of an erratic discretion or determined will, totally disregard or deliberately violate it. Again, mind possesses the power of operating upon circumstances themselves,—the great source of all presumption,—and of giving them appearances to suit particular purposes. Besides, many of the facts indicative of conduct are, in themselves, wholly *psychological*; that is, they are confined to the mind itself, and cannot, in their nature, be made the subjects of direct observation, but are to be reached only by inference. Finally, the whole process of investigating the facts constituting cases of moral conduct, is materially different from that by which the phenomena of nature are explored; and this is especially the case where criminal conduct is made the subject of judicial examination, for the purpose of detecting its cause. The power which investigates is compelled to observe with the senses of others; to take its facts, as it were, at second hand; to rely upon the observations of witnesses, not always made under circumstances favorable to perfect accuracy, and rarely made with a view to future use;

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(*a*) See 1 Stark. Evid. 25–29.

(*b*) *Id.* 25, note.



and in addition to these disadvantages, is often forced to grope its way to truth through a veil of obscurity purposely cast around the whole transaction. In some cases, facts are entirely lost, from not having fallen under the notice of any observer. From these and the like causes, important elements of truth are sometimes excluded from the process, and elements of disturbance and error introduced; rendering the application of any general rule more or less uncertain, and liable to exception. Hence it happens that presumption, as it is employed for the discovery of moral truth, comes to possess that quality of *contingency* which may be considered its chief characteristic, and of which more will be said hereafter, in treating of presumption as a *result*. It does not discover the truth sought with absolute precision, but only presents an approximation to it. In short, its whole operation is not to demonstrate certainty, but to establish probability. (a)

But, though by no means infallible, presumption and the general laws in accordance with which it is exercised, constitute, nevertheless, valuable and, indeed, (as will be seen in the sequel,) indispensable aids and guides to investigation. Though imperfect, they are the best attainable means for the discovery of the truths to which they are applied. Their ultimate foundation is similar to that already noticed as the foundation of presumption, when applied to material objects; namely, a confidence in the *permanence* of the existing order of nature, and a belief that the conduct of men will *continue* to be influenced and regulated by their opinions, passions, and habits, as well as by surrounding circumstances: and (to give the idea its most general expression,) that what has repeatedly happened under certain

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(a) Bishop *Butler* uses the terms "presumption" and "probability" in close connection, as expressive of the same idea. *Analogy*, Introd. *Id.* part I. c. I.

circumstances, will, under the same circumstances, happen again. (a)

The conduct of men, as it constitutes a basis of presumption, includes, as we have seen, their *habits*; and these comprise not only what may be called natural habits, but artificial habits, such as the customs and conventions of society, the course of trade and dealing, and even the personal habits of individuals. (b) The great fundamental presumption applicable to these subjects, is, also, the same which has been already noticed; namely, that of *continuance*.

The presumption of *continuance*, indeed, may be considered the most general one that can be entertained by the mind. The very word "continuance," according to *Butler*, implies a kind of presumption or probability from analogy. (c) And as it is deeply founded in nature, so it is extensively recognized in law. Things once proved to have existed in a particular state, are to be understood as *continuing* in that state, until the contrary is established by evidence. (d)

The knowledge of the connections between facts, upon which presumption has been shown to rest, is obtained by *experience* and observation. By these terms are understood, not the mere *personal* experience and observation of the party presuming, for that is often very limited, and never extensive enough to meet all cases in which the exercise of presumption may be required; but the general experience and observation of mankind, (e) to which it is the constant

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(a) A very instructive view of the nature and foundation of presumption is given by Mr. *Starkie*, in his "Treatise on the Law of Evidence," vol. i. pp. 28-29, and the note *ibid*.

(b) Best on Pres. § 181, *et seq.* 3 Phill. Evid. (Cowen & Hill's notes) Note 285. 1 Stark. Evid. 85, 75.

(c) Butler's Analogy, part I, ch. I.

(d) Best on Pres. § 186. 2 Evans' Pothier on Obl. 284. 1 Stark. Evid. 86.

(e) Experience comprehends not merely the facts and deductions of personal observation, but the observations of mankind at large in every age and country.

and necessary habit of the individual mind to refer, upon which it relies with the same confidence as if they were its own, and which it actually makes its own, whenever occasion may require. In the language of a definition already quoted, it is not merely what ordinarily takes place, (*quod plerumque fit*), but what is *understood* to take place, (*fieri intelligitur*.) (a)

IV. The *character* of the process of natural presumption is next to be considered. It is *probable* reasoning, (b) as distinguished from demonstrative. It is not of that close and severe kind, (termed by the civilians *argumentum necessarium*, (c)) where the conclusion follows necessarily from the premises, and the mind is allowed no discretion, and left no alternative in adopting it. (d) It is what the civilians

Wills on Circ. Evid. 10, 11. Mr. *Starkie* uses the word in the narrower sense, implying the actual observation of the individual. 1 Stark. Evid. 26, note; 27.

(a) See *ante*, p. 12.

(b) This is the constant language of the civilians. *Præsumptio est*—illatio probabilis ex argumentis. Strauchius Diss. 25, aphor. 88. *Opinio ex probabili ratiocinatione concepta*. Vinnius, Jurispr. Contr. lib. 4, c. 86. *Probatio ex probabilibus argumentis*. G. A. Struvius, Syntag. Juris, exerc. 28, s. 15. *Probatio per argumenta probabilia facta*. Westenbergius, Princ. Jur. lib. 22, tit. 3, n. 21.

(c) *Argumentum vel necessarium vel contingens est*. Necessarium, cujus consequentia necessaria est, *veluti eam coivisse quæ peperit*; contingens, cujus consequentia probabilis est, *veluti eadem fecisse qui cruentatus est*. Matthæus de Crim. c. 6.

(d) Where the existence of one fact so necessarily and absolutely induces the supposition of another, that if the one is true, the other cannot be false, as where connection is inferred from pregnancy, the term *presumption* cannot be legitimately applied. 2 Evans' Pothier on Obl. 280; num. 16, sect. 14. "The moment we talk," says Mr. *Best*, "of any thing following as a necessary consequence from others, all idea of presumptive reasoning is at an end." *Best* on Pres. § 192. Mr. *Starkie's* view of presumption is quite different and peculiar. According to his opinion, a presumption is, in strictness, an inference made solely by virtue of previous experience, and *independently of any process of reason*, in the particular instance. 1 Stark. Evid. 478. 3 *Id.* 1235. He further considers the term *presumption* as including *certain* as well as

have expressively called *argumentum verisimile*. (a) The conclusion to which it leads is assented to, because of its probability or *verisimilitude*; not because of its absolute and self apparent *truth*, (*verum*) which is rarely attained, but because of its *likeness*, similitude or approximation to truth. (b) The inference sought is presented to the mind in the shape of a question between two probabilities; namely, whether a fact, considered in its relation to one or more other facts, be true or not: in determining which, the mind exercises a discretion of judgment, and finally decides according to a preponderance of probability. Hence presumption has been said to mean “nothing more than the *weighing of probabilities*, and deciding, by the powers of common sense, on which side the truth is.” (c) This was stated on the authority of Lord *Mansfield*, who, in the celebrated *Douglas* case, gave the reason of the process in the following words. “It is an undoubted truth that judges, in forming their opinion of events, and in deciding upon the truth or falsehood of controverted facts, must be guided by the rules of *probability*; and as mathematical or absolute certainty is seldom to be attained in human affairs, reason and public utility require that judges and all mankind, in forming their opinion of the truth of facts, should be regulated by the superior number of the probabilities on the one side or the other.” (d).

This process of *weighing* (which is only another term for the exercise of *judgment*,) goes on with more or less

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probable inferences. *Id. ibid.* But this, as Mr. *Best* has shown, is an obvious departure from the true sense of the word. *Best on Pres.* § 8, note, and authorities there cited.

(a) See the definition of *Matthæus*, cited *ante*, p. 12.

(b) *Quoniam in arduo est veri exploratio,—ea ire qua ducit veri similitudo.* Seneca de Benef. lib. 4, c. 83.

(c) *Best*, J. in *Rex v. Burdett*, 4 B. & Ald. 95, 124. See 1 Stark. Evid. 451, 452.

(d) Quoted in *Theory of Presumptive Proof*, p. 62.

rapidity, according to the degree of clearness with which the fact used and its connection with the fact sought are apprehended. It, doubtless, is always exercised, though sometimes, where the case is very clear, so instantaneously, that the mind itself may be unconscious of it; the result suggesting itself with almost the readiness of an intuitive perception. (a) In judicial investigations of the truth of criminal charges, this balancing of probabilities is not allowed; as will be more fully shown in another place. (b)

It is further to be observed of the reasoning involved in this process of natural presumption, particularly where it is applied to subjects not of a professedly scientific character, that it is not of an abstruse or technical kind, dealing in remote or refined analogies, and which can be apprehended and followed by none but cultivated and practised minds; but it is a simple, ordinary act of an ordinarily intelligent understanding. It is, in short, merely an exercise of *common sense*, (c) being what the civilians have expressively designated as *præsumptio hominis*. The only exception to this entire competency of "the common mind" to judge for itself, exists in those cases where the perception of the proper relation between facts, depends on some *peculiar science* or skill, attainable by only a comparatively few persons. But even this circumstance interposes no difficulty in the way of arriving at a desired conclusion. The means of judging are, in such cases, always borrowed, without hesitation, from the statements of those whose experience qualifies

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(a) See Wills on Circ. Evid. 16.

(b) See *post*, Chapter IV.

(c) *Communi sensu perceptum*. Matthæus De Crim. in Lib. 48 Dig. tit. 15, c. 6. See 1 Phill. Evid. 436. And see the opinion of Best, J, in *Rex v. Burdett*, 4 B. & Ald. 95. Mr. Starkie has well observed that "presumptions could never have been adopted as the means of proof before a jury, if their nature and force could not be estimated by men of plain and ordinary sense and discretion." 1 Stark. Evid. 24. And see Beccaria on Crimes, c. 14.

them to express a reliable opinion; (a) and with these borrowed means, transferred and superadded to its own stock of knowledge, the mind finally acts as freely and effectively as if they had always been its own.

V. The *result* of this process of probable reasoning is a persuasion or *belief* of the truth or falsity, the existence or non-existence, of the fact which it is its object to discover. It is this result, indeed, which the term *presumption* is usually employed to express; and in this secondary sense it will now be more particularly considered. (b)

By the majority of English writers on evidence, presumption is expressly defined to be *an inference* or consequence. Thus, according to Mr. *Starkie*, "a presumption may be defined to be an inference as to the existence of a fact not actually known, arising from its necessary or usual connection with others which are known." (c) According to Mr. *Phillipps*, "a presumption is a probable inference which our common sense draws from circumstances usually occurring in such cases." (d) According to Mr. *Wills*, "the word presumption, *ex vi termini*, imports an inference from facts;" (e)—"it inherently imports a conclusion of the judgment." (f) The same writer expressly defines a presumption to be "a probable consequence drawn from facts,

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(a) As to the evidence of experts or scientific witnesses, see 1 Stark. Evid. 74.

(b) In the sense of *process*, the word "presumption," it will be seen, is used only in the singular number, and without an article. In the sense of *result*, it is used both in the singular and plural number; in the former, always with an article prefixed.

(c) 1 Stark. Evid. 28, 24. And see another definition by the same writer. 8 *Id.* 1234.

(d) 1 Phill. Evid. 486. This is almost a literal translation of the definition of *Matthæus*, cited on a former page. *Ante*, p. 12.

(e) *Wills* on Circ. Evid. 16.

(f) *Id.* 17.

as to the truth of a fact alleged, but of which there is no direct proof." (a)

Considering presumption in this sense of a *result*, it is indispensable, as we have seen, to its creation, that it be founded on one or more *facts*, and that these facts should be, either directly established, or themselves deduced from other facts, upon the same principle of inference; so that the ultimate presumption may be connected, either mediately or immediately, with facts established by proof. (b) A presumption may be founded on a *single* fact, as constantly happens in the common affairs of life. Where this is the case, the result is arrived at, with comparative ease and rapidity; the only mental process employed being that of pure inference. But it may, also, and frequently does have for its basis, a *variety* of facts, and in these cases, which usually present the most important questions for determination, the formation of a presumption is a matter of more difficulty; as, in addition to the process of inference, there is a necessity (especially if the facts be numerous and independent,) for the employment of the auxiliary or preparatory processes of arrangement, combination and comparison. There is not only the bearing of each fact upon the desired conclusion, to be ascertained, but also the consistency of the different facts with each other. The process, in short, is a complex, and not a simple one.

Supposing, however, the presumption to be duly formed, the first thing observable respecting it, is the variety of *degrees of strength* in which it is found to exist,—from the

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(a) Wills on Circ. Evid. 17. According to *Pothier*, a presumption is a judgment which the law, or which an individual makes, respecting the truth of one thing, by a *consequence* deduced from another thing. *Pothier on Obl.* p. 4, c. 8, sect. 2. "Presumptions are *consequences* drawn from a fact that is known, to serve for the discovery of the truth of a fact that is uncertain, and which one seeks to prove." *Theory of Presumptive Proof*, 17.

(b) 2 Evans' *Pothier on Obl.* 288; num. 16, sect. 14.

lowest degree of probability, consistent with the formation of any definite belief, up to that high degree of assurance which falls short only of positive and absolute certainty. (a) Some writers, indeed, consider presumption to begin at a still lower point, that of mere supposition, (b) surmise or conjecture, which has also been sometimes fixed as its lowest degree, or weakest variety, in its application to legal investigations. (c) But presumption, properly so called, cannot be said to begin until there has been some exercise of judgment, however limited, as to probability, and some definite, (however inadequate) conclusion or belief (d) arrived at. A fact may arrest the attention and impress the mind; it may even suggest the idea of another fact, as a possible cause, concomitant or result, (which seems to be the true definition of a *conjecture*,) and it may lead to active inquiry into the correctness of such idea or impression; but unless the latter fact be pronounced prob-

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(a) Butler's Analogy, Introd. 1 Phill. Evid. 487.

(b) It has sometimes been spoken of as "mere naked presumption," as though it were something essentially slight and ineffective. *Holroyd, J. in Rex v. Burdett*, 4 B. & Ald. 189. And Bishop Butler seems to recognize the three degrees of presumption, opinion and full conviction. Analogy, Introd.

(c) Domat's Civil Law, part I, b. 8, tit. 6, c. 4, sect. 2. Some of the civilians expressly define a presumption to be a *conjecture*: *Conjectura ducta ab eo quod ut plurimum fit*. Heineccius ad Pand. pars 4, sect. 124. *Est ex indicis tantum quedam conjectio*. Matth. de Prob. c. 1, n. 43. *Præsumptiones sunt conjecturæ ex signo verisimili ad probandum assumptæ*. J. Voet ad Pand. lib. 22, tit. 3, n. 14. The Latin *conjectura*, however, as thus used, seems to convey more than the English word by which it is commonly translated; its radical import, like that of *conjectio*, being "a throwing together," a putting together, a putting of one fact with another so as to show their relation; which very aptly expresses the whole essence of the process of presumption. But *conjectura* was also used by the civilians in the sense of conjecture or surmise. Mascardus defines it to be "a reasonable trace of a latent truth, from which the opinion of a prudent man may take its rise;" (*rationabile vestigium latentis veritatis, unde nascitur opinio sapientis*.) De Prob. lib. 1, quæst. 14.

(d) "It has been said, you cannot presume unless you believe." Lord Chancellor Erskine, in *Hillary v. Walker*, 12 Vesey Jun. 289, 266.



able in some degree and for some reason, there results no presumption, in the true sense of the word. (a)

The strength of a presumption may be said, generally, to depend, first, on the certainty of the fact or facts from which it is gathered; and, secondly, on the justness of the consequence drawn from them to prove the fact or facts in dispute. (b) More particularly, it may be said to depend upon the following circumstances or considerations: first, the intrinsic impressiveness of the fact from which it is deduced; secondly, the clearness with which such fact is apprehended, or the certainty with which it is made to appear; thirdly, the closeness of its connection with the fact sought to be proved; fourthly, the number of instances in which this connection has been established; fifthly, its combination with other corroborating facts; and sixthly, the absence of any fact tending to qualify or vary the conclusion, or actually tending to an opposite conclusion. In other and fewer words, it depends upon the degree of *probability* apparent in the case.

The degrees of probability being very extensive, it seems impossible to classify the degrees of presumption itself, under any other division than the very general one of their *comparative* weakness and force; a division well expressed by the terms *levior* and *fortior*, employed by the civilians. (c) What degree of probability shall be sufficient to satisfy the judgment, and so induce a presumption, in any particular case, must, of course, depend upon the individual circumstances of such case, as made apparent to the mind at the

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(a) "That the slightest possible presumption," says *Butler*, "is of the nature of a probability, appears from hence, that such low presumption often repeated will amount to moral certainty." *Butler's Analogy*, Introd. See 1 *Phill. Evid.* 437.

(b) *Domat's Civil Law*, p. 1, b. 8, tit. 6, sect. 4, art. 8.

(c) *Huberus, Prælect. Jur. Civ. lib.* 22, tit. 8, n. 15. See further, under the head of "presumptions of fact," *post*, p. 51.

time of the investigation ; and cannot therefore, in its nature, be previously defined by any general rule. (*a*)

What may be called the *completeness* or sufficiency of a presumption, when formed, will be found to vary according to the circumstances under which it is formed, the length of time allowed for the presumptive process, the nature of the subject, and the use intended to be made of the conclusion itself. Where no great accuracy is necessary, or where no time is allowed for minute or deliberate investigation, as sometimes happens in that class of natural presumptions upon which some immediate action is intended to be based, a judgment formed upon what may be termed the *exterior* probabilities of the case, that is, upon a few prominent and impressive facts, without seeking for other facts of a corroborative or infirmative kind, will often be sufficient. In the common affairs of life, men are frequently obliged from necessity and duty to act upon the lowest degree of belief ; (*b*) and where such action concerns none but the parties themselves, or, if it affect others, is in no danger of affecting them injuriously, it cannot be objected to. But where accuracy is important, as where the consequences of error are dangerous, especially to the rights of others, and time for thorough investigation is given, a judgment gathered from the surface of the case is never a safe nor proper basis of action. And where the correctness of a presumption is actually disputed by a party whose rights are claimed to be injuriously affected by it, in the form of a judicial issue, such a judgment will not be permitted. In investigations of this character, it is essential, in order to ascertain with any confidence the truth of the facts proposed to be established, not only that the *leading* evidentiary facts should be known, but that *all* the facts and circumstances connected with them,

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(*a*) Domat's Civil Law, *ubi supra*. 2 Evans' Pothier on Obl. 288.

(*b*) Wills on Circ. Evid. 14. See Butler's Analogy, Introd. cited *post*, p. 40.

and serving to explain or qualify them, should be made to appear. Indeed, it is always desirable that *all* the evidentiary facts of the case should, if possible, be presented precisely as they occurred, and in their original connection. If this could uniformly be done, if the case could be thus reproduced in its original form, (the principal fact alone being wanting,) the presumption sought to be deduced from it would follow naturally and as a reasonable and obvious conclusion from fully established premises.

But this completeness and accuracy of presentation, especially where the transaction to be investigated consists of numerous facts, are rarely attainable in practice. In almost every case as it occurs, there is some fact which, through accident or design, fails to come to the notice of any observer, and is thus stricken out of the connection, and becomes as though it had never existed. Cases, as presented to courts in evidence, often exhibit chasms of this kind, leading to perplexity and doubts on the part of juries, and eventually to insuperable disagreement or acquittal. Again, the order in which the facts are presented is not always the same with that in which they occurred, and, from this cause, their mutual connection and dependence sometimes fail to be correctly appreciated. Lastly, the facts are liable to take a false coloring from the medium of evidence through which they come. In this way, elements of certainty are lost, and positive elements of error introduced into the investigation. From all these causes, the deduction of a presumption often becomes a matter of difficulty, involving the slow and laborious processes of analysis, comparison, arrangement, and combination, of which more will be said hereafter. And when the process is at length completed, the result proves to be a mere *approximation* to the truth desired.

In order to render this approximation to absolute truth as close as possible, recourse is had to certain *tests*, pointed out by reason and experience, by which the strength of a pre-

sumption may be tried, and its accuracy determined. These tests are various suppositions or *hypotheses*, applied to the facts from which the intended presumption is to be drawn, with the view of ascertaining their entire sufficiency to constitute it. It may be observed that, in most cases, the presumption, while in process of formation, and until conclusively made up, itself takes the shape of a *supposition*, so that, while in this state or stage, one supposition, if at all reasonable, is as much entitled to notice as another. Indeed, the process of presumption is often nothing more than the selecting, out of two or more suppositions, that one which, upon examination, seems most consistent with probability and reason.

Sometimes, this test of hypothesis is applied to the evidentiary facts, *singly*, and apart from their connection with others, by inquiring whether this or that particular fact will admit of more than one explanation, or may not be equally well accounted for upon more than one supposition. But it is necessary, in such cases, that all the suppositions should have some appearance of probability; the suggestion of a remote and merely possible or fanciful hypothesis will have no weight in varying a conclusion otherwise plainly indicated. (a) Indeed, the whole method of applying these tests to the *individual* facts, with a view of varying what is seen to be their joint or general result, is often fallacious, and may be considered essentially destructive of the effect of all evidence of the presumptive kind. The facts proved or admitted, if found to be relevant, and not inconsistent, are to be taken in their *connection*, and viewed in the light which they mutually reflect on each other. (b)

The great test of the strength or sufficiency of a presumption, is to look at the assemblage of facts collectively form-

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(a) See 2 Evans' Pothier on Obl. 289.

(b) See Butler's Analogy, part 2, chap. 7.

ing the case under consideration, upon *opposite* sides, or from opposite points of view; to treat the contemplated result, (though it be presented to the mind in the form of a distinct proposition which it is desired to establish,) as a doubt to be settled, a question which of two opposite suppositions or hypotheses is to be credited and relied on; and, for this purpose, to compare the facts with both suppositions, so as to ascertain their consistency or inconsistency with one or the other. (a) And this process of testing, it may be observed, is essentially a natural, and not exclusively an artificial one; although art may be employed to give it greater exactness and efficacy.

The grand rule on this subject, the application of which will be more fully considered in the course of this work, is that the facts proved must not only be consistent with the truth of the proposition, supposition or hypothesis which they are intended to establish, but they must also be actually inconsistent with the truth of the opposite proposition, or of such hypotheses as may be resolvable into it. (b) In other words, they must not only render the affirmative supposition probable, but the negative improbable. (c) If, under the application of this test, it be found that the facts of the case are wholly inconsistent, in any one particular, with the truth of that supposition or hypothesis, which, if finally approved, would become the presumption desired, such supposition cannot be maintained, and must be abandoned for some other.

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(a) See 2 Evans' Pothier on Obl. 289-298. Instead of a case presenting simply two opposite general propositions, an affirmative and a negative, it sometimes presents several, or rather, the general negative proposition divides itself into a variety of particular hypotheses, which are nothing more than various modes of accounting for, or explaining the facts proved, or reconciling them with such negative proposition. This often happens on the trial of issues in criminal cases, as will be shown in a subsequent chapter.

(b) See the last note.

(c) 2 Evans' Pothier, 289.

The conversion of the process of presumption into the solution of a question between two opposite suppositions, (as just adverted to,) is much facilitated, where the fundamental facts, as they are discovered or proved, are of so obvious a bearing as to range themselves at once on opposite sides. (a) In these cases, the two important points to be considered are, first, the *number* of the opposing facts; and, secondly, the *degree* of their opposition.

Where the facts from which the affirmative supposition is deducible, are abundantly sufficient, if considered by themselves, to indicate and maintain its truth; but are met by a body of facts on the opposite side, indicating with equal or nearly equal clearness the contrary, there is always great difficulty in arriving at any satisfactory conclusion, or deducing, on the whole, any presumption that can be confidently relied on. But it more frequently happens that the facts stand relatively thus: a number, constituting the larger proportion, are found to point unitedly, with great, or at least reasonable clearness, to the conclusion or presumption desired; but there happen to be one or two, and sometimes more, but always a smaller number, which either absolutely point in an opposite direction, or throw seeming difficulties in the way of the affirmative supposition. Whether this supposition shall finally prevail, so as to constitute the presumption desired, depends, of course, upon the ease with which these conflicting or disturbing elements can be got rid of.

The rule on this subject may be briefly laid down to the following effect: that if there be but a *single* fact on the opposite side of the question, but the degree of its opposition amounts to absolute and manifest *inconsistency* with the truth of the affirmative supposition, its effect will be to de-

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(a) As to the disposition of such facts as are termed by the writer last quoted, "ambiguous," that is, admitting of more than one exposition, see 2 Evans' Pothier, 292.

stroy that supposition entirely, however clear and reasonable it may otherwise appear to be. It thus more than counterbalances the whole mass of facts on the other side. But the mere existence of a fact on the opposite side, which is *not accounted for*, will not be attended with this effect. And the reason of the difference is that, in the former case, the nature of the opposing fact is such that it cannot possibly, and under any circumstances, be made to harmonize with the affirmative supposition; but, in the latter, the difficulty arises from want of full information in regard to the apparently discordant fact. In the latter case, the mind is merely embarrassed in adopting what it, nevertheless, sees to be the only rational conclusion: in the former, it sees its absurdity, and is at once compelled to relinquish it. (a)

Hence it is concluded, by an able writer on the subject, that "when a series of facts, distinctly and unequivocally

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(a) M. Burlamaqui, in his "Treatise on the Principles of Natural and Politic Law," has the following judicious observations on the subject of difficulties in the form of mere objections. "I own, it is necessary, in the research of truth, to consider an object on every side, and to balance equally the arguments for and against: nevertheless, we must take care we do not give to those objections more than their real weight. We are informed by experience that, in several things which, in respect to us, are invested with the highest degree of certainty, there are many difficulties, notwithstanding, which we are incapable of resolving to our satisfaction, and this is a natural consequence of the limits of the mind. Let us conclude, therefore, from hence, that when a truth is sufficiently evinced by solid reasons, whatever can be objected against it, ought not to stagger or weaken our conviction as long as they are such difficulties, only, as embarrass or puzzle the mind, without invalidating the proofs themselves." Part I, chap 2, sect. 11. And in a note, he proceeds to quote the following passage from the *Bibliothèque Raisonnée*, as serving further to explain the reason. "There is a wide difference between seeing that a thing is absurd, and not knowing all that regards it; between an unanswerable question in relation to a truth, and an unanswerable objection against it; though a great many confound these two sorts of difficulties. Those only of the latter order are able to prove that what was taken for a known truth cannot be true, because otherwise some absurdity must ensue. But the others prove nothing but the ignorance we are under, in relation to several things that regard a known truth." *Biblioth. Rais. tom. 7, p. 846.*

proved, manifestly tends to one conclusion, and another fact is proposed in contradiction to that conclusion, the mere inability to account for such opposite fact is not sufficient to destroy the inference deduced from the others, but the positive inconsistency should be fully shown." (a) But, on the other hand, he continues to remark, "a presumption is not to be hastily formed, from the difficulty of explaining the cause and reason of existing circumstances, unless the whole of the subject with which those circumstances are connected is sufficiently seen. This applies more strongly, when the difficulty is, to account for the non-existence of facts, which might be reasonably supposed to exist, upon a different supposition from that which is assumed. There is no point upon which presumption is more material than in ascribing to particular conduct, motives and dispositions which cannot be seen, and can only be inferred from the facts that are seen, and the probable motives by which they may be occasioned; but it will often be very fallacious to reason upon the motives or disposition of others, without a most perfect view of all the circumstances with which they are connected." (b) We shall see, in the course of the present work, that, in criminal investigations, if the mind becomes, from *whatever* cause, embarrassed to such a degree as to create a reasonable and permanent doubt of the truth of the affirmative supposition, such supposition must be abandoned.

Such are the methods which reason and experience have pointed out, for giving to natural presumptions the quality of as close approximations to absolute truth as is consistent with their character. Under no circumstances, however, can a natural presumption be said to be invested with the quality of positive *certainty*. This would be destroying its distinctive character, as an inference of probability. As

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(a) 2 Evans' Pothier on Obl. 291, 292.

(b) *Id.* 298. These remarks are made with an obvious reference to the *Douglas* case, which is commented on in what follows.



long as it continues to be a mere presumption, so long is it a merely *contingent* inference ; (a) it may, or may not, in fact, be correct. Subsequent actual knowledge may demonstrate its truth or falsity ; and this may be the case, whatever be the degree of the presumption itself. A mere conjecture *may* prove to be the truth ; the most confident belief *may* turn out to be without foundation. If thus verified, the presumption is immediately superseded ; if the reverse, it is wholly destroyed. But, until thus superseded or destroyed, it is always more or less implicitly relied on, as the best attainable means for the discovery of a desired truth. Hence the intrinsic soundness of the law maxim, *stabitur præsumptioni, donec probetur in contrarium*. (b)

The last thing to be observed of presumption, whether considered in the sense of a process or a result, is its quality or effect as *proof*.

The whole object of presumption, as has been already explained, is to ascertain the existence of a fact which cannot be directly made to appear, by the indirect course of inference from other facts of which such direct evidence exists. Its peculiar function is to apply such evidence, indirectly and argumentatively, to the fact which is sought to be established. Now, as satisfactory evidence of any kind becomes proof, (c) so the process which applies such evidence, and, indeed, gives it its satisfactory and convincing quality and effect, ought, it would seem, to be regarded as a process of proof. But by some of the best writers on evidence, presumption is carefully distinguished from proof. Thus, according to Lord Chief Baron *Gilbert*, "where the fact itself *cannot be proved*, that which comes nearest to the proof of

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(a) The civilians call the argument itself by which it is deduced, a contingent one, (*argumentum contingens*.) *Matthæus de Crim. c. 6*; cited *ante*, p 22, note (c).

(b) See 2 *Evans' Pothier*, 280, 281.

(c) 1 *Stark. Evid.* 450.

the fact, is the proof of the circumstances that necessarily and usually attend such facts; and [these are] called presumptions and *not proofs*, for they stand instead of the proofs of the fact, till the contrary be proved." (a) So, *Pothier* observes that "presumption differs from *proof*, properly so called; the latter attests a thing directly and of itself; presumption attests it by a consequence deduced from another thing." (b) And Sir *W. D. Evans*, in his commentary on the last named writer, by way of appendix, adds that "the distinction between presumption and *proof*, is, that the one may be false, but until shown to be so, must be regarded as true; but the other, (the facts upon which it is founded being admitted,) cannot be otherwise than true." (c) There are writers, on the other hand, comprising names of the highest authority on the subject, who so far blend the ideas conveyed by these terms, as actually to make the one descriptive of the other. This may be seen in the constant use of the expression "presumptive proof,"—which signifies proof by presumption,—in the well known works of Mr. *Starkie*, (d) Mr. *Phillipps*, (e) and Mr. *Best*. (f) And some of the civilians have adopted the same view; not only considering presumption as proof, (*probatio*,) but even defining it by that word. (g)

This diversity of opinion arises from the circumstance that the term "proof," itself, has not, by any means, a

(a) 1 Gilb. Evid. 142. 2 Russell on Crimes, 726.

(b) Pothier on Obligations, part 4, c. 8, sect. 2.

(c) 2 Evans' Pothier on Obl. 281.

(d) 1 Stark. Evid. 481.

(e) 1 Phill. Evid. 436, 439. The essay appended to the second edition of Phillipps on Evidence, entitled, "On the Theory of Presumptive Proof," is usually attributed to this writer.

(f) The third part of Mr. *Best's* work on Presumptions, is entitled, "On Presumptive Proof in Criminal cases."

(g) *Præsumptio est probatio negotii dubii ex probabilibus argumentis*. G. A. Struvius, Syntag. Jur. exerc. 28, s. 15. *Præsumptio est probatio per argumenta probabilia facta*. Westenbergius, Princ. Jur. lib. 22. tit. 3, n. 21.

single invariable signification. (*a*) In its most general sense, proof is the satisfactory establishment of the truth or falsity of some alleged matter of fact; (*b*) but this takes place, as has already been sufficiently explained, by two very different processes, corresponding with the nature of the truth in question; namely, by showing such truth to be reasonable, and probable, and by demonstrating it to be certain. In the latter sense of the term, it is clear that presumption is not proof. (*c*) In the former, presumption is constantly regarded as practically equivalent to proof, if not importing the same idea. Indeed, it has been judicially said, that "proof is nothing more than a presumption of the highest order." (*d*)

Presumption has, thus far, been chiefly considered in its two senses of the *process* and *result* of inference from facts. There is another sense in which the term is often employed, which requires some notice before passing from the present division of the subject; namely, that of *assumption* or *proposition*. Thus, when it is said that every man is *presumed* to intend the natural and probable consequences of his own

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(*a*) Proof is a generic term; an appellation given to any thing which serves to convince the mind of any truth, and necessarily varying with the nature of that truth. Best on Pres. § 4. As there are truths of diverse sorts, so likewise there are different kinds of proofs. Domat's Civil Law, part I, b. 8, tit. 6.

(*b*) "We call that a proof," says Domat, "which convinces the mind of a truth." Civil Law, *ubi supra*. Things established by competent and satisfactory evidence are said to be *proved*. 1 Greenl. Evid. § 1. "To prove" is to convince another of the truth of our assertions. In law, *probare est fidem facere judici*; to prove is to convince or satisfy the judge. Theory of Presumptive Proof, 20. See argument in the case of *Philip Standsfield*, 11 Howell's State Trials, 1388. And see 1 Stark. Evid. 450.

(*c*) Some writers, especially the civilians, employ the term "proof" in the limited sense of the result of *direct* evidence; and this enables them to draw the line very distinctly between presumption and proof. See Pothier on Obl. p. 4, c. 8, s. 2, cited *ante*, p. 37. J. Voet ad Pand. lib. 22, tit. 3, n. 15, &c.

(*d*) Wills on Circ. Evid. 32; citing Lord *Erskine* in the *Banbury Peerage* case. "We ought," says Domat, "to take good heed, not to distinguish [separate] the sense of the word *presumptions* from that of *proofs*, in such a

voluntary acts, this is not a *presumption*, in either of the senses which have been explained ; that is, it is neither a process of inference, nor an inference itself, from a known to an unknown fact, by a course of probable reasoning. It is an immediate and necessary deduction of reason from the known constitution of the human mind. It is an abstract proposition, carrying its truth upon its face. It is not a special means employed to discover some particular desired truth ; nor is it a result having the quality of an approximation to truth ; but it is a direct assumption of the very truth itself. Finally, it has no *contingent* character ; it is not to be taken for truth *until* the contrary is proved. It is held for truth under all circumstances, and the contrary is not susceptible of proof. It is, in short, a principle, a general rule, a maxim of natural reason, a guide to the formation of presumptions in particular cases ; the force of which resides not only in its intrinsic justice, but in its absolute necessity to the order and well-being of society.

Again, it is always *presumed* that men are in their best or most natural estate or condition ; that is, that they are sane, not insane ; innocent, not guilty ; legitimate, not illegitimate ; and the like. This is not so much a presumption as a direct *assumption* of the whole truth required. It is an abstract general rule, founded upon like considerations of reason and necessity as the one last noticed. In two respects, however, it does partake of the character of a *presumption*, in the stricter sense. First, it is intrinsically founded upon *probability*, and the natural course of things. Thus, sanity arises naturally from the ordinary constitution and union of the human mind and body ; insanity springs from some disturbing cause. Sanity is the rule ; insanity the exception. Hence, in any given case, where a particular individual be-

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manner as never to take presumptions to be proofs, seeing there are such presumptions as are sufficient to establish the proof of a fact." Civil Law, part I, b. 8, tit. 6.

comes the subject of remark or judgment, he is presumed to be of sound mind. Nor will any mere allegation to the contrary, avail to destroy this natural and reasonable presumption. But, secondly, however strong the persuasion or belief may be, it is, like any other strict presumption, entirely *contingent*. The contrary is always allowed to be shown; and when circumstances of sufficient force for that purpose are proved, the presumption immediately shifts to the opposite side; or rather, the general and ordinary presumption gives place to a special and particular one. (a)

It is in this last mentioned sense of *assumption, proposition* or *rule*, that the term "presumption" is extensively used in law, as will be particularly shown in the following section. Indeed, what are termed "presumptions of law," are exclusively of this character, being either conclusive or conditional, according to the case.

The process of natural presumption, as it has just been described, is one that is called into constant exercise in the ordinary course of life, and is applied alike to the most momentous and the most trivial concerns. Opinions are extensively formed by it, and action is, every day, confidently based upon it. And this takes place, not only as a conclusion of reason, but as a matter of obvious necessity. Absolute certainty, in matters of moral conduct, is rarely to be attained. In tracing out the causes of action, as well as in looking forward to its results, we are, at every step, compelled to rely upon probabilities and presumptions. (b) "He that will not eat," observes a great metaphysician, "till he has demonstration that it will nourish him; he that will not stir till he infallibly knows the business he goes about will succeed, will have but little else to do but to sit

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(a) 2 Evans' Pothier on Obl. 283.

(b) Burlamaqui, Princ. Nat. and Pol. Law, part I, ch. 6, sect. 6. Butler's Analogy, Introd. And that men constantly form their opinions, and act, even in matters of importance, upon very low degrees of probability and presump-

still and perish." (a) Probability is called by another profound reasoner, "the very guide of life." (b) Indeed, the whole business of human life may be said to be founded upon one grand and constant presumption,—the continuance of life itself.

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## SECTION II.

### *Judicial Presumption.*

THE nature and application of presumption, as a means of discovering truth in general, especially in matters relating to human conduct, and the reasons why it is resorted to for that purpose, have been sufficiently explained in the last section. The same reasons will be found to account satisfactorily for its employment in the character in which it is next proposed to be considered; namely, as a means of *judicial* investigation.

A trial before a judicial tribunal is nothing more than an inquiry, under certain forms of procedure, into the truth of

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tion, is very clearly shown by the author last cited. *Burlamaqui* remarks that men often act upon mere possibility. *Princ. N. and P. Law, ubi supra.*

(a) *Locke's Essay on the Human Understanding*, b. 4, c. 14, s. 1.

(b) *Butler's Analogy*, Introd. The same ideas, expressed with great force and beauty of illustration, are to be met with in so early a writer as *Seneca*. *Nunquam expectare nos certissimam rerum comprehensionem, quoniam in arduo est veri exploratio; sed eâ ire quâ ducit veri similitudo. Omne hac viâ procedit officium. Sic serimus, sic navigamus, sic militamus, sic uxores ducimus, sic liberos tollimus: quum omnium horum incertus sit eventus. Ad ea accedimus de quibus bene sperandum esse credimus. Quis enim pollicetur serenti proventum, naviganti portum, militanti victoriam, marito pudicam uxorem, patri pios liberos? Sequimur quâ ratio, non quâ veritas trahit. Expecta, ut nisi bene cessura non facias, et nisi comperta veritate nihil moveris; relicto omni actu vita consistit.* *De Beneficiis*, lib. 4, c. 83.

facts connected with, or growing out of human conduct; with the additional effect of annexing certain legal consequences to the result, and of enforcing such consequences against the individual who may become liable to them. A criminal trial constantly deals with human conduct in its most unfavorable aspects; those, namely, of action contemplated and committed against law, and action seeking to escape the penalties of law: its policy throughout being to throw every species of obstacle in the way of investigation by direct means. Hence the peculiar necessity, in these cases, of resorting to the *indirect* or *presumptive* method of inquiry.

Judicial presumption may be divided into two distinct kinds; that which is made by the *law*, as represented by the court; and that which is made by the *jury*, as the appointed investigators of matters of fact. The latter is, for the most part, nothing more than natural presumption, or the presumption of the individual, (*a*) as it has already been described, and as it will be further considered, under the head of presumptions of fact: the former is a different species, resting often on artificial grounds, and hence called *artificial* as well as *legal* presumption. (*b*)

The law, then, as well as the individual, is under the necessity of inferring, intending or presuming the existence of facts, as the basis of its conclusions. The definition of a distinguished French writer places both on the same footing, in regard to the process of presumption itself, and the foundation on which it rests. (*c*) In its process of presumption,

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(*a*) 1 Greenl. Evid. § 44.

(*b*) 8 Stark. Evid. 1235, 1241.

(*c*) Presumption may be defined to be a judgment which the law, or which an individual makes respecting the truth of one thing, by a consequence deduced from another thing. These consequences are founded upon what commonly and generally takes place. (On peut définir la présomption, un jugement que la loi ou l'homme porte sur la vérité d'une chose, par une conséquence tirée d'une autre chose. Ces conséquences sont fondées sur ce qui arrive com-

however, the law takes a different course from that pursued by the judgment of the individual or juror. As it contemplates conclusions, not of a temporary but permanent kind, intended to have, not a particular but a general application, it takes into account other considerations than those of mere probability or reasonableness. It looks to policy, expediency and convenience, as well as to reason. It seeks to give to its deductions the quality of practical and general utility, as well as those of moral justice and logical propriety. And when it has framed its inferences, it frequently makes up for their want of intrinsic certainty, by superadding a technical certainty of its own creation; or, in other words, by converting what would otherwise be a contingent, variable inference, into a fixed and inflexible rule; the presumption, in such cases, being called one of law, in a double and peculiarly emphatic sense,—a *præsumptio juris et de jure*. It does not so much regard the actual truth of facts in particular cases, as the correctness of the legal consequences which are attached to them. In short, the whole process is more or less arbitrary in its character: the term *presumption*, itself having, in this application, rather the absolute sense of *assumption*, which has already been alluded to. (*a*)

To consider this process of legal presumption more particularly. In some cases, a mere natural presumption or inference is taken and adopted, without change. Thus, the general presumption of reason, considered under the preceding head, (*b*)—that every man intends the natural and

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munément et ordinairement.) Pothier, *Traité des Oblig.* p. 4, c. 8, sec. 2. But see the next note.

(*a*) *Ante*, p. 10. In legal presumption, there is, strictly speaking, as an accurate writer has shown, no *inference*; that is, there is no special inference or process of reasoning from fact to fact, as there is in natural presumption. What is called legal presumption is properly *assumption*; a legal presumption is a *proposition* of law, or the application to a certain fact proved, of a rule previously established. See 6 *Lond. Law Magazine*, 354.

(*b*) *Ante*, p. 88. As to the qualification of sanity in the statement of this presumption, see *post*, p. 47.



probable consequences of his own acts,—is converted into a fundamental and most important maxim of law; (a) and from it are deduced such particular rules or conclusions as the following: that he who sets fire to a building, intends injury to its owner; (b) that he who forges the handwriting of another, intends to defraud him; (c) and that he who lays a poison for another, or discharges loaded arms at him, intends death or bodily harm to him. (d) In other cases, the law takes a natural presumption, and gives it an increased force; or, in other words, attaches to the facts which give rise to it, an artificial effect beyond their natural tendency to produce belief. (e) Thus, the presumption of payment from a receipt under hand and seal, is a natural one, because true in the vast majority of cases; but it does not amount to a necessary consequence. The conclusive effect of such a receipt is altogether a creature of the law. (f) In other cases again, the law, from a similar motive of expediency, establishes inferences which natural reason does not perceive, and to which it sometimes does not assent. In these cases, the process is purely artificial, resting on a foundation arbitrarily assumed, and not only not proved, but often incapable

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(a) Best on Pres. § 16. 1 Phill. Evid. 444. 1 Greenl. Evid. § 18. *Haire v. Wilson*, 9 B. & Cress. 648. Lord *Ellenborough*, in *Rex v. Dixon*, 8 M. & S. 11, 17.

(b) *Rex v. Farrington*, Russ. & R. Cr. C. 207.

(c) *Rex v. Sheppard*, *Id.* 169. See *Rex v. Mazagora*, *Id.* 291. 2 Russell on Crimes, 862. *Commonwealth v. Whitney*, Thacher's Crim. Cases, 588.

(d) Best on Pres. § 16. 1 Greenl. Evid. § 18. See *State v. Smith*, 2 Strobhart, 77.

(e) 8 Stark. Evid. 1285. Best on Pres. § 16. See the reasoning of Lord Chancellor *Erskine*, in *Hillary v. Walker*, 12 Vesey Jr. 289, 266, 267.

(f) 1 Gilb. Evid. 148. Best on Pres. §§ 16, 17. 3 Stark. Evid. 1272. But the common law doctrine as to the conclusive effect of a seal, is to be taken subject to the equitable doctrine of relief against sealed instruments, and to such modifications as have been introduced by statute. See *Harden v. Gordon*. 2 Mason, 581, 561. 2 New York Revised Statutes, 406, § 77; (328, § 97, 2d ed.)

of being proved. The assumption mentioned by Mr. *Best*, that all persons in a kingdom, whether natives or foreigners, are acquainted with its common and general statute law, belongs to this class. (a)

In what has just been said, presumption has been considered chiefly in its character of a *process*. It is in the sense of a *result* or consequence, however, that the term is most frequently used in connection with judicial investigations. (b) Viewed in this light, presumptions are inferences, positions and assumptions, derived from various sources, framed upon different principles, and invested with various degrees of force and authority. They are of two principal kinds: presumptions of law, and presumptions of fact. (c)

I. Presumptions of law, or, as they are sometimes called, *intendments* of law, and by the civilians, *præsumptiones seu positiones juris*, are, in the words of an English writer on the subject, "inferences or positions established, for the most part, by the common, but occasionally by statute law, and are obligatory alike on judges and juries." (d) They differ from presumptions of fact and mixed presumptions, (e) according to the same writer, in two important respects; first, that no discretion in drawing the inference is vested in the tribunal, but the law peremptorily requires a certain inference to be made, whenever the facts appear which it assumes as the basis of that inference; and, secondly, that, as they are in reality rules of law, (f) and part of the law itself,

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(a) *Best*. on Pres. § 16.

(b) See *ante*, p. 25.

(c) 1 *Greenl. Evid.* § 14. A third division is sometimes added to there, by writers who treat the subject minutely, consisting of *mixed* presumptions, or those which partake of the qualities of both the others. See *Best* on Pres. §§ 14, 38. 3 *Stark. Evid.* 1243.

(d) *Best* on Pres. § 15.

(e) As to mixed presumptions, see *supra*, note (c).

(f) See *Vinnius*, *Jurispr. Contr.* lib. 4 tit. 86.

the court may draw the inference, whenever the requisite facts are developed in pleading, without the intervention of a jury. (a)

Of these presumptions of law, some are, as already observed, (b) mere natural presumptions or principles, recognized and enforced without change. Others are natural presumptions artificially strengthened. Others, again, are mere technical assumptions, or arbitrary rules. They have long been divided into two distinct classes; *conclusive*, or absolute, and *disputable* or rebuttable presumptions. (c)

*Conclusive* presumptions, as they are ably explained by an American writer on the subject, "are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long experienced connection [between facts] has been found so general and uniform, as to render it expedient for the common good, that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden." (d) These presumptions have been termed by the common lawyers, irrebuttable presumptions, and by the civilians, *præsumptiones juris et de jure*. The force of the latter expression is thus explained by *Menochius*:—"it is called a *præsumptio juris*, because it is a presumption made by law, and *de jure*, because the law holds for truth the presumption thus made, and establishes a fixed right upon it." (e) They are in

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(a) Best on Pres. § 15.

(b) *Ante*, p. 43.

(c) Best on Pres. § 17. 1 Greenl. Evid. § 14.

(d) 1 Greenl. Evid. § 15.

(e) *Præsumptio juris, quia a lege introducta est, et de jure, quia super tali*

fact, as *Vinnius* has observed, (a) rather *rules* of law, than presumptions in the proper sense. Of this class is the presumption that a sane man contemplates and intends the natural and probable consequences of his own acts, (b) which has already been shown to be a natural presumption or principle. (c) Another is, that an infant under seven years of age is incapable of committing a felony, (d) which also rests essentially upon the laws of nature; the precise limitation of time being dictated by obvious considerations of expediency, and indeed of necessity. "In these cases of conclusive presumption," it has been well remarked, "the rule of law merely attaches itself to the circumstances, when proved; it is not deduced from them. It is not a rule of inference from testimony; but a rule of protection, as expedient, and for the general good." (e)

*Disputable* or rebuttable presumptions, otherwise called inconclusive presumptions, and by the civilians *præsumptiones juris tantum*, are, like the preceding class, intendments made by law, but, unlike them, only hold good until dis-

*præsumptione, lex inducit firmum jus, et habet eam pro veritate.* Menoch. de Præs. lib. 1, qu. 3. The explanation of *Mascardus* is nearly in the same words: *super hac præsumptione lex firmum sancit jus, et eam pro veritate habet.* De Prob. vol. I, qu. x. 48. *Alciatus* defines a *præsumptio juris et de jure* in the following expressive language: *est dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis.* Tract. de Præs. pars 2, n. 8.

(a) *Jurispr. Contr.* lib. 4, tit. 36.

(b) 1 Greenl. Evid. § 18. Lord *Ellenborough*, in the case of *Rex v. Dixon*, (8 M. & S. 11, 15,) said "it was an universal principle, that when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law, resulting from the doing the act."

(c) *Ante*, p. 43, where it is stated in a more general form, omitting the qualification of *sanity*. In this form, there is a double presumption involved; first, that of *sanity*, and secondly, that of the natural action of a sane mind. Thus generally expressed, the presumption belongs to the rebuttable class. See *Best on Pres.* § 25.

(d) 1 Hale's P. C. 27. 4 Bl. Com. 28. *Best on Pres.* § 17.

(e) 1 Greenl. Evid. § 82.

proved. (a) "These, as well as the former," observes an American writer, already quoted, "are the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class, is not so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode, *the law* defines the nature and amount of the evidence which it deems sufficient to establish a *primâ facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favor of the presumption." (b) Presumptions of this kind may be rebutted by presumptive, as well as by direct evidence; the weaker presumption giving way to the stronger. (c)

A prominent example of this class of inconclusive presumptions, is the well known presumption in favor of innocence. (d) Another is that of malice from the fact of killing a human being. (e) These two presumptions, taken together,

(a) Best on Pres. § 25. J. Voet ad Pand. lib. 22, tit. 8, n. 15.

(b) 1 Greenl. Evid. § 38. So the civilian *Baldus* defines a presumption of law to be, *animi legislatoris ad verisimile applicatio, onus probandi transferens*. Bald. in Rubr. Cod. de Prob. (lib. 4, tit. 19,) n. 4. Best on Pres. § 25, note (e).

(c) *Præsumptio juris dicitur, quæ ex legibus introducta est, ac pro veritate habetur, donec probatione aut præsumptione contraria fortiore enervata fuerit*. J. Voet ad Pand. lib. 22, tit. 8, n. 15. Best on Pres. §§ 25, 48.

(d) 1 Greenl. Evid. § 34. Best on Pres. § 25.

(e) Foster's Crown Law, 255, 290. 1 Hale's P. C. 455. 1 East's P. C. 340. *Rex v. Farrington*, Russ. & R. Cr. C. 207. 1 Greenl. Evid. § 34. See note (b) on next page. Mr. Best considers this presumption as resting partly on natural equity, and partly on policy. Best on Pres. § 16.

furnish a good illustration of the shifting and flexible character belonging to this species of legal intendment or inference. A person accused of homicide is presumed to be wholly innocent until proved guilty, and the burden of this proof always rests on the prosecutor. But as soon as proof has been made, sufficient to show that the accused *did kill* the deceased, the presumption, which before was in his favor, now shifts against him ; it being presumed that he killed him with a malicious intent. (a) Here we have a presumption of innocence followed by one of guilt, and carrying with it the burden of proof ; that is to say, it is now incumbent on the accused to show, affirmatively, circumstances of justification or extenuation, in order to escape from the otherwise decisive effect of the presumption of a malicious killing. (b) Both these are presumptions of law ; but a presumption of law may also be rebutted by a presumption of fact. (c) Thus, to take the same presumption of innocence in a similar case of homicide, if proof be made, on the part of the prosecutor, that the accused suppressed or destroyed certain evidence, which would have tended to fix the charge upon him, or fabricated evidence to produce a false show of innocence, a contrary presumption of guilt is at once raised against him ; which however, (being in this case a presumption of fact,) is for

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(a) 1 Stark. Ev. 452. 2 *Id.* 948. 2 Russell on Crimes, 781. See the authorities cited in the last note.

(b) 1 Stark. Evid. 452. 1 Greenl. Evid. § 84. This is the rule in Massachusetts, as expressly recognized and affirmed in the case of *Commonwealth v. York*, (9 Metcalf, 98;) and, more recently, in *Commonwealth v. Webster*, 5 Cushing, 305. The same rule prevails in New York, (*The People v. McLeod*, 1 Hill, 377, 436,) New Jersey, (*The State v. Zellers*, 2 Halsted, 220, 248,) and Virginia; (*Hill's Case*, 2 Grattan, 594.) The same rule prevailed also in Pennsylvania, before the act of 1794. *Pennsylvania v. Honeyman*, Addison, 148. *Pennsylvania v. Lewis*, *Id.* 171. *Pennsylvania v. McFall*, *Id.* 357. *Pennsylvania v. Bell*, *Id.* 282. But by that act, the burden of proof is thrown on the prosecutor, to show circumstances of malice in the first instance. See *Commonwealth v. O'Hara*, 1 Wharton's Dig. 327, (4th ed.)

(c) As to presumptions of fact, see the next general head.

the jury alone to consider, in making up their verdict upon all the evidence before them. (a)

Natural presumption has already been shown to be founded on certain connections between facts, ascertained by *experience* to have uniformly or usually existed in cases previously observed. (b) Legal presumption has also been shown to rest on a similar foundation of knowledge derived from a similar source. (c) The law, (that is, the court which administers the law,) is, as well as the individual, said to have *experience* of the necessary or usual connection between particular facts, and by virtue of this legal experience, it presumes, or rather assumes, similar connections to exist in particular cases. (d) So that legal is essentially founded upon natural presumption, (e) being, in other words, natural presumption modified by artificial rules.

Artificial presumptions, thus made by the law itself, whether of the conclusive or inconclusive kind, are not, in general, used as rules of evidence, for the purpose of ascertaining doubted facts, but are, in effect, mere arbitrary rules of law. They are founded, as we have seen, upon principles of policy and utility, without any necessary reference to the real existence of the fact presumed, and sometimes entirely independently of it. (f) Hence, although beneficial as *general* and practical rules, they are, in the words of a judicious writer, "usually very uncertain and precarious instruments for the investigation of truth in *particular* instances. They

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(a) 1 Greenl. Evid. § 87. Best on Pres. §§ 148, 149. 2 Evans' Pothier on Obl. 287, 288.

(b) See *ante*, pp. 14, 21.

(c) *Ante*, p. 42.

(d) 1 Stark. Evid. 76, 77.

(e) Wills on Circ. Evid. 18.

(f) 3 Stark. Evid. 1236, 1240, note. In fictions, which are closely allied to irrebuttable presumptions of law, the fact itself has no existence; it is wholly and avowedly created by the law, and not allowed to be disputed. Best on Pres. § 20, *et seq.* 2 Evans' Pothier, 281.

are therefore unfit to be employed where any application of the law, contrary to the real fact, would be attended with positive injustice, as in criminal cases." (a) In these cases, they, for the most part, give place to that other description of presumptions, known as *presumptions of fact*, which will next be considered.

II. Presumptions of fact, (b) as employed in judicial investigations, are inferences as to the existence of certain facts proposed and disputed, deduced by reasoning or argument, (c) from certain other facts shown: (d) both species of facts being made the subjects of actual inquiry, with the view of ascertaining the *truth* of their existence in particular cases. To constitute these presumptions, *two* descriptions of facts standing in this relation to each other, are always necessary: the object of the presumption being to connect them together. (e) The designation of these inferences as simply those "of fact," would seem, on its face, not to express with entire accuracy their distinctive character. (f) In strictness, *all* presumptions deal with facts, as the essential basis of all law. (g) The most artificial presumptions of

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(a) 3 Stark. Evid. 1236, 1239, note. See the reasoning of this author, *Id. ibid.* And see Best on Pres. § 190. Wills on Circ. Ev. 20.

(b) That is, of *mere fact*, as distinguished from mixed presumptions of law and fact. 8 Stark. Evid. 1241, 1244.

(c) They are themselves called "mere arguments," by high authority. 1 Greenl. Evid. § 44. But the term "argument" or "reasoning," seems applicable to presumption as a process, rather than as a result. See *ante*, p. 22.

(d) 1 Phill. Evid. 486. Mr. *Best's* definition of a presumption in a legal sense, is "an inference, affirmative or disaffirmative of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning, from some one or more matters of fact, either admitted in the cause or otherwise satisfactorily established." Best on Pres. § 11.

(e) They are the same with the principal and evidentiary facts, which have already been explained. See *ante*, p. 8.

(f) *Pothier's* division of presumptions is into those established by law, and those not established by any law. Oblig. part 4, c. 8, sect. 2, §§ 2, 8.

(g) *Ex facto jus oritur*. 2 Inst. 49. 8 Bl. Com. 829. Best on Pres. § 9.



law, when resolved into their elements, will be found to contemplate the same two species of facts, standing in a similar relation to each other. Thus, the presumption of law, that a receipt under *seal* is conclusive evidence of payment, (a) obviously involves two distinct facts,—the existence of a sealed writing, and payment or satisfaction: for payment, though, in one view, merely a legal consequence annexed to the actual fact of a sealed receipt, is, in itself, *a fact*, though an assumed one. But the word “fact,” in the expression “presumptions of fact,” is used in an emphatic sense. (b) It is *actual*, as distinguished from assumed fact: fact which has had a real existence, and the *truth* of which is always to be investigated, whenever it is presented for consideration. In presumptions of law, the fact may be, and constantly is assumed,—sometimes actually and wholly created: its intrinsic truth being often regarded as less material than the observance of a legal rule or consequence. But in presumptions of fact, the actual truth of the fact is the exclusive and all-important subject of investigation, without regard to consequences. (c) The facts which are the basis of the presumption must always be proved in each case, and the fact presumed is itself arrived at by a process so convincing as to be regarded as equivalent to proof. In short, a presumption of fact is the natural connection of one fact with others, by a combined process of proof and argument: a presumption of law is a similar connection, artificially made, by annexing a rule of law, or legal incident, to a particular fact proved.

Another and a material point of distinction between presumptions of fact and those of law, is in regard to the *tribu-*

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(a) *Ante*, p.44, and the note *ibid*.

(b) These presumptions, might, in another language, be called with much aptness and brevity, *præsumptiones de facto*; that expression combining the three ideas of presumption about a fact, presumption from a fact, and presumption actually made.

(c) 3 Stark. Evid. 1231, 1232. *Id.* 1236, note.

*nal* appointed to deal with them. The inferences, as we have seen, are always to be made upon a basis of actual fact, and, as nearly as possible, according to the exact truth of the particular case which is the subject of inquiry. Hence the deduction of them necessarily falls within the particular province of that tribunal, or rather that branch of the tribunal, whose allotted duty is to investigate and declare the truth of disputed matters of fact, namely, the *jury*; who are always bound by oath to decide according to the real truth, without regard to consequences. (a) In the discharge of this duty, thus solemnly assumed, the jury are limited by no boundaries but those of truth and actual fact, which they are always bound to find according to their conscientious conviction and persuasion, unfettered by any extraneous considerations of policy and convenience. (b) In the process of inference, the jury merely exercise their natural faculties of judgment and common sense: first, ascertaining the truth of the facts which are its basis; and then allowing to these facts merely their own natural force and efficacy in generating belief and conviction in the mind, as derived from those connections which are pointed out by experience. In fine, a presumption of fact is nothing more than a natural presumption, judicially applied. (c)

Presumptions of fact, then, are to be understood as

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(a) 1 Stark. Evid. 76, 445. 3 *Id.* 1282, 1245. It is true that jurors sometimes may make, and, indeed, are required to make, presumptions of strict law: but, in so doing, they are merely passive instruments in the hands of the court, exercising none of that discretion and natural judgment which properly characterize their function. See *Id.* 1226. So, on the other hand, the courts sometimes draw inferences of pure fact. *Id.* 1246.

(b) 3 Stark. Evid. 1281.

(c) So, in the Roman law, presumption is said to be either that which is made by the *law*, or by the *judge*, (*vel a lege inducitur, vel a iudice*,) the latter being distinguished as *præsumptio hominis*, the presumption of the man or individual, that is, natural presumption unfettered by strict rule. Heineccius ad Pand. pars 4, s. 124.

comprising that great mass of inferences which juries are constantly called upon and specially authorized to draw, from the immense variety of facts which are presented to them by means of evidence, on the trials of judicial issues. Lord *Mansfield*, in the case of *Goodtitle dem. Brydges v. Duke of Chandos*, (a) distinguished them from presumptions of law, as being “a species of *evidence* ;” and spoke of them as being “of the nature of evidence.” They have been said by an accurate writer, to belong to *evidence itself*,—that is, to statements made by witnesses, or contained in documents offered to a court of justice,—in contradistinction to legal presumptions, which belong to the *law of evidence*. (b) “Presumptions of fact,” it is further said, “do not properly belong to the law of evidence. They are arguments, probable, improbable, or certain, involving no consideration of law, equally valid in and out of a court of justice, belonging to any subject matter, and to be judged by the common and received tests of the truth of propositions and the validity of arguments.” (c) Strictly, they are processes founded upon evidence of the indirect kind, (and which is hence termed *presumptive* evidence ;) or, rather, results deduced from it, as will be fully explained in a subsequent part of this work. “They depend,” according to a standard American author, “upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and

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(a) 2 Burr. 1065, 1072, 1073.

(b) 6 Lond. Law Mag. 369.

(c) *Id.* 370 See 1 Greenl. Evid. § 44. Best on Pres. § 14.

directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever." (a)

In one point of view, however, these natural presumptions are not independent of legal control. They may be, and frequently are wholly excluded from the consideration of juries, by rules excluding the evidence which would raise them. (b) Thus, the admission by an accused person, that he is addicted to the commission of offences similar to that with which he is charged, though a circumstance *naturally* entitled to consideration, is, in law, inadmissible to prove his guilt in the actual case. (c) So, the fact that such a person bears a notoriously bad character, though, according to *natural* reason, entitled to its weight in producing an impression of his guilt, will not, in law, be allowed to be shown in evidence, in the first instance, with a view to criminate. (d) So, on the other hand, the effect of some of the rules of evidence is to invest natural evidence with an artificial weight, and sometimes to receive that which, abstractly considered, ought not to be received as evidence at all. (e)

Another important feature by which these presumptions of fact are distinguished, is that they are not only the appropriate subjects of consideration by *juries*, but that a discretion, more or less extensive, as to entertaining and acting upon them, is always vested in that tribunal. (f) Hence,

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(a) 1 Greenl. Evid. §§ 44, 48.

(b) Best on Pres. § 28. "Although," observes this writer, "in resorting to presumptive reasoning, judges and jurors only apply under the sanction of the law, a process which the unassisted reason of man would have applied for itself, it by no means follows, *et converso*, that all facts which are *naturally* evidentiary of others, will be received as evidentiary of them in the courts of justice." *Id. ibid.*

(c) *Id. ibid.* citing *Rex v. Cole*, Mich. 1810. 1 Phillipps & Amos on Evidence, 499.

(d) Best on Pres. §§ 151, 155.

(e) *Id.* § 28.

(f) *Id.* § 15

where they are overlooked or disregarded, the granting of a new trial is always a matter resting in the discretion of the court, and not a matter of right, as in case of the disregard of a presumption of law. (a)

The *grounds* or sources of these presumptions of fact, are obviously innumerable, being co-extensive with the facts which may, under any circumstances whatever, become evidentiary in courts of justice. (b) They are, indeed, no other than the facts themselves which constitute the materials or elements of circumstantial or presumptive evidence. They have been classed under the three general heads of *things*, *persons*, and the *actions* or thoughts of intelligent agents. (c) They will be considered in detail hereafter, under appropriate divisions. (d)

The *process* by which these presumptions are deduced from their fundamental facts, is identical with that employed in the investigation of ordinary subjects; namely, a process of probable reasoning, conducted on principles which have already been sufficiently explained. The immediate guides to their formation are certain previously established results of human experience and observation, which are adopted as general standards or rules for judgment in corresponding cases, such as the following:—that conformity with the ordinary course of nature is to be presumed: that persons are to be presumed to be in the possession of their reasoning faculties: that men are to be presumed to act according to the dictates of their nature, and in conformity with the known customs and habits of society. These are sometimes referred to as examples of presumptions of fact; (e) but they are obviously only mere *rules* of presumption. Examples of pure presumptions of fact are such as the following. A person is seen lurking around a building, or coming out of it,

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(a) Best on Pres. § 15.

(b) *Id.* § 27.

(c) *Id. ibid.*

(d) See *post*, Part II.

(e) Best on Pres. § 27.

in a suspicious manner, at an unseasonable hour of the night; and, soon after, the building is seen to be on fire. The presumption is that such person was the incendiary. A person is observed to enter the premises of another, and is never seen alive afterwards. Portions of a human body, corresponding in description to the body of the missing person, are subsequently found concealed upon the premises, under the lock and key of the occupant. The presumption is that such person met his death there, and at the hands of the occupant. (a)

Of these presumptions, when formed, it is sufficient to observe that they are always of the *contingent* kind, that is, subject to be rebutted or disproved by counter evidence: the maxim, in all cases applying,—*stabitur præsumptioni, donec probetur in contrarium*. (b)

Presumptions of fact are constantly employed as means and aids towards the discovery of truth, on the trials of judicial issues, both in civil and criminal cases. The execution of a written instrument, (c) and the commission of a murder, may be proved by the same indirect process. (d) It is in *criminal* cases, however, that they assume a peculiarly important character, being constantly resorted to, from the necessity of the case, and largely, and sometimes exclusively relied on, as means of establishing the proof of charges putting liberty, character and life itself, in peril. In these, too, it happens that they are found in their greatest variety, and are, for the most part, allowed to prevail with their entire natural weight. The present chapter will therefore be closed with some considerations particularly illustra-

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(a) These examples are given merely as presenting combinations of prominent facts, from which inferences may be made, without reference to the completeness or sufficiency of the inferences themselves.

(b) Bract. lib. 3, c. 22, fol. 148. Co. Litt. 878, b. 3 Bl. Com. 871. 2 Evans' Pothier on Obl. 281.

(c) 3 Stark. Evid. 1280, 1281.

(d) 1 Phill. Evid. 487.

tive of the character and practical value of presumptions in *criminal cases*.

The weight allowed to considerations of expediency and policy, in framing presumptions of law, has already been adverted to. (*a*) It is in *civil* cases that these presumptions are chiefly found to have application, and for reasons peculiar to that division of subjects. It is in these that the interest of the individual is more commonly subordinated to that of the community. The probable or actual inconvenience, or even the seeming moral injustice, (abstractly considered,) which may be sustained by a party whose rights are made the subject of adjudication in any particular case, is deemed to be compensated by the general good resulting from fixed invariable rules, though resting essentially on an artificial basis. But in *criminal* investigations, especially those which may result in the infliction of an extreme punishment, the case is directly reversed. The interest of the individual whose conduct is the subject of inquiry, is here the leading consideration, to which those of supposed general utility are always made to yield. (*b*) This is very forcibly illustrated by those two great cardinal maxims which may be said to be written on the portals of every criminal court, and to hang over an accused, like an ægis of protection, from the moment he is placed at its bar for trial :—*Every person is presumed to be innocent, until proved to be guilty : It is better that many*

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(*a*) See *ante*, p. 48.

(*b*) Dr. *Paley* takes the opposite view, maintaining that the sufferings, or even the death of an innocent individual, when they are occasioned by no evil intention, cannot be placed in competition with the security of civil life ; and that he who falls by a mistaken sentence, may be considered as falling for his country, whilst he suffers under the operation of those rules, by the general effect and tendency of which, the welfare of the community is maintained and upheld. *Paley's Moral Philosophy*, b. 6, c. 9. These opinions have been strongly condemned by two of the latest writers on circumstantial evidence. See *Best on Pres.* § 215. *Wills on Circ. Evid.* 154.

*guilty persons (a) should escape, than that one innocent person should suffer.* In these cases, it becomes essential that the range of inquiry should be enlarged, in proportion to the magnitude of the interests at stake; that truth should be drawn from its natural sources by natural processes, unfettered, as far as practicable, by arbitrary and inflexible rules. (b) And these objects are very effectually secured by the composition of the tribunal itself, to which the decision of criminal issues is exclusively confided. Hence it happens that the great mass of those presumptions with which juries are authorized to deal, and upon which their verdicts are constantly founded, are of that class which the unaided "common sense" of men (c) is competent to deduce from facts proved. In other words, they are natural presumptions, or presumptions *of fact*.

It is not to be understood, however, that presumptions *of law* are excluded from the view of juries in criminal cases. Some leading presumptions of this class, and belonging to its rebuttable division, such as the presumption of malice in cases of homicide and of an intent to defraud in cases of forgery, (d) constantly occur for consideration, and are of great importance as guides to correct conclusions. It is true, that these are essentially founded upon a natural presumption which has been already adverted to; (e) but they are

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(a) It may not be trivial to notice the varieties of expression which different writers have adopted, in stating this most important rule. "It is better," observes Sir *Matthew Hale*, "five guilty persons should escape unpunished, than one innocent person should die." 2 *Hale's P. C.* 289. "It is better," says Sir *W. Blackstone*, "that ten guilty persons escape, than that one innocent suffer." 4 *Bl. Com.* 358. *Wills Circ. Evid.* 153. "It is better," says Mr. *Starkie*, "that ninety nine (i. e. an indefinite number of) offenders should escape, than that one innocent man should be condemned." 1 *Stark. Evid.* 507.

(b) *Wills on Circ. Evid.* 20, 21, 26.

(c) 1 *Phill Evid.* 486. 1 *Stark Evid.* 24. 1 *Greenl. Evid.* § 48.

(d) See *ante*, p.p.44,48. *Best on Pres.* § 190, note.

(e) That every man intends the natural and probable consequences of his own acts. See *ante*, p. 38, 39. And see 1 *Greenl. Evid.* § 14.



not processes, nor the results of processes of reasoning from proved facts in particular cases. The fundamental natural presumption itself has been shown to be strictly an abstract *rule* or maxim, (*a*) and of the same character are the legal presumptions derived from it. Hence it belongs properly to the province of the *court* to direct the attention of the jury to such of them as become applicable in cases submitted to them for trial. (*b*)

Of conclusive presumptions (*præsumptiones juris et de jure*), in criminal cases, there are but few; and the fewer, it is said, the better. (*c*) The reason of this has already been explained. (*d*) The presumption of fear, in cases of robbery, is of this class; and this is always required to be made, *in odium spoliatoris*, even though the evidence may show that, in fact, no fear existed. (*e*)

Presumptions of fact, in criminal cases, have been usually classified according to their degree of strength, probative force, or proving power. In the common law of evidence, as laid down by Lord *Coke*, *three* sorts of presumption were recognized,—violent, probable and light: *violent* presumption being considered as full proof; *probable*, as of little weight; *light*, of no weight at all. (*f*) But the third of these is rejected, as not deserving any consideration, by Lord C. B. *Gilbert*, who considers presumptions as *twofold*;

(*a*) See *ante*, p. 89.

(*b*) See an instance on the trial, in the case of *Commonwealth v. Webster*, Bemis' Report, 457. As to the weight to be allowed the testimony of accomplices, see 1 Greenl. Evid. § 45.

(*c*) Best on Pres. § 190, note.

(*d*) See *ante*, p. 50.

(*e*) 1 Phill. & Am. Evid. 468.

(*f*) "And, many times, juries, together with other matter, are much induced by presumptions, whereof there be three sorts, viz. violent, probable and light or temerary, [rash]. *Violenta præsumptio* is many times *plena probatio* *Præsumptio probabilis* moveth little; but *præsumptio levis seu temeraria* moveth not at all." Co. Litt. 6 b.

violent or only probable. (a) Sir *William Blackstone*, though he formally adopts Lord *Coke's* division, (b) follows substantially, the views of *Gilbert*. Thus, after adopting the latter's definition of presumptions, namely, the circumstances which necessarily or usually attend the facts, (c) he makes violent presumption to arise from circumstances "which *necessarily* attend the fact," and probable presumption "from such circumstances as *usually* attend the fact." (d) But instead of regarding the latter, with Lord *Coke*, as "of little weight," he remarks that it has "its due weight." (e)

The example of violent presumption, given by Lord *Coke*, is well known. A man is run through the body with a sword, in a house, and instantly dies of the wound; another man is seen to come out of the house with a bloody sword; and no other man was at the time in the house. (f) The presumption deducible from these circumstances, or the fact considered to be proved by them, is that the person with the sword was the murderer. And this is held to be a necessary presumption, which must be made, and cannot be escaped; the circumstances being considered to exercise upon the mind an overpowering degree of force or coercion, well expressed by the epithet "violent." (g) Lord C. B. *Gilbert* states the example in somewhat different terms: "As if a man be found suddenly dead in a room, and another be found

(a) 1 Gilb. Evid. 142.

(b) 8 Bl. Com. 871.

(c) *Id. ibid.*

(d) *Id. ibid.* See the examples given *ibid.*

(e) *Id. ibid.* And see 8 Phill. Evid. (Cowen & Hill's notes) Note 286.

(f) "As if one be run thorough the body with a sword, in a house, whereof he instantly dieth; and a man is seen to come out of that house, with a bloody sword; and no other man was at that time in the house." Co. Litt. 6. b.

(g) Such circumstances have been called, in the language of the civil law, *indicia indubitata*, undoubted tokens, which extort belief, (*quæ fidem extorquent*.) Trial of Capt. *Green* and his crew, 14 Howell's State Trials, 1199, 1281.

running out in haste, with a bloody sword. This is a violent presumption that he is the murderer; for the blood, the weapon and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself, is the proof of those circumstances that do necessarily attend such fact." (a) It will be seen that the important circumstance of *no other person* being in the house, (b) which was doubtless considered by Lord *Coke* as the turning point of the presumption, is altogether omitted by *Gilbert*, and a new circumstance, not mentioned by *Coke*, is introduced; namely, "the hasty flight" of the suspected person, (c) upon which a principal stress is laid. (d)

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(a) 1 Gilb. Evid. 142.

(b) See *supra*.

(c) Mr. Serjeant *Hawkins* gives the same example in the following form. "Violent presumption, from plain circumstances, is in some cases taken for full proof; as where a man is stabbed in a house, and another runs out with a bloody knife in his hand, and no one else is in the house." 2 Hawk. P. C. 618; b. 2, c. 46, sect. 42. Both the circumstances mentioned by *Coke* and *Gilbert* are here introduced. The example itself is manifestly framed in much more precise and careful terms than that given by the last named writer.

(d) This example, and the presumption intended to be illustrated by it, may be traced, in England, to a remote period of antiquity. *Bracton*, writing on crown law as early as the thirteenth century, treats at some length of presumptions as means of proof, especially in cases of homicide. Among these, he enumerates presumptions which do not admit either of proof or defence to the contrary; as if a man with a bloody knife have been caught over a dead person, (*ut si quis cum cultello sanguinolento captus fuerit super mortuum*;) or in the act of fleeing from a dead body, (*vel a mortuo fugiendo*.) Bract. lib. 8, cap. 22, ¶ 1, fol. 148. In another passage, he calls such a presumption a violent one, (*violenta præsumptio*;) as where a man is caught over a dead body, with a bloody knife, he cannot deny the killing, and there is no need of other proof. And this, he observes, is an ancient law or ordinance, (*et hæc est constitutio antiqua*.) *Id.* cap. 18, ¶ 4, fol. 137. So, in *Britton*, the king, who speaks through the writer, ordains that if a man be found slain, and any one be found near him, with a bloody knife or other weapon, thereby raising a suspicion that he has slain him, the coroner shall go immediately to the spot, and in his presence, by the testimony of those who witnessed the felony, the suspected person shall be condemned to death. Britt. cap. 5, fol. 14 b. Both these writers also mention the case of a person being found alone in a house where another has been found killed, as affording a conclusive presumption against him, unless he had

The conclusion just mentioned as drawn from the statement of facts embodied in the example given by Lord *Coke*, has been disputed, and indeed reprobated by some modern writers, (*a*) on the ground that it does not take into account certain suppositions or hypotheses, such as those of suicide and accident, upon either of which, the facts of the case might be consistent with the entire innocence of the accused. (*b*) But there is reason for the opinion that the example itself was purposely framed to exclude these very hypotheses; and so acute a writer as Mr. *Starkie* has not hesitated to regard the circumstances as wholly and necessarily excluding any hypothesis but one. (*c*) The subject will be further considered under another head. (*d*)

The following may be taken as an illustration of the three different degrees of presumptions which have been mentioned. If, upon an indictment for stealing in a dwelling house, it should appear in evidence that the accused was apprehended a few yards from the door, with the stolen goods in his pos-

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raised the "hue and cry," or could show, as by wounds upon his person, that he had attempted to protect the deceased against the felonious assault of another. Bract. fol. 137 b. Britt. fol. 14 b. The presumption in this case seems to have been made to turn upon views of public policy. A person who happened to be alone in close proximity with another who had been murdered, might escape suspicion by raising the "hue and cry," which, indeed, it was his imperative duty to do. If he neglected this duty, the law visited his neglect upon his own head. And although this peculiar institution of ancient police has for centuries fallen into disuse, its radical idea may be said to subsist in the obvious policy by which individuals found in unfavorable or dangerous positions or circumstances, are urged to make an open and immediate disclosure of the facts, instead of seeking to escape by the hazardous expedients of concealment and artifice.

(*a*) Best on Pres. § 30. 8 Benth. Jud. Evid. 236, 237. "If the learned authors above quoted," observes Mr. *Best*, "mean to say, as their words imply, that there is no possible mode of reconciling the above facts with the innocence of the man seen coming out of the house, the proposition is monstrous." Best on Pres. *ubi supra*.

(*b*) See these suppositions stated at length, *post*, Chapter IV, Sect. III.

(*c*) 1 Stark. Evid. 483, 484, note.

(*d*) See *post*. Chapter IV, Sect. III. And see Part II.

session, the presumption raised by this evidence would be a *violent* presumption that the goods were stolen by him. If they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would raise a *probable* presumption of the same fact. But if the property were not found recently after the loss, as for instance, not until sixteen months after, the presumption would be *light* or rash, and entitled to no weight. (a)

But the utility of this threefold classification has been strongly questioned. (b) It was long ago modified, as we have seen, by Chief Baron *Gilbert*. (c) And, by modern writers, it has been considered more accurate in principle, and more useful in practice, to classify presumptions of fact, with reference to their effect on the *onus probandi*, or burden of proof. (d) In this view, which is that taken by some of the civilians, presumptions may be divided into two kinds, *slight* and *strong*, or *slighter* and *stronger*, (e) (*leviores et fortiores*.) (f)

A *slight* presumption (*præsumptio levior*,) is one which serves to excite suspicion, and to impress the tribunal in some degree, but does not, taken by itself, either amount to proof, or shift the burden of proof. (g) Thus, where a per-

(a) Best on Pres. § 81, citing Archbold's Criminal Pleading, 124. (9th ed.)

(b) Best on Pres. *ubi supra*. 2 Russell on Crimes, 727.

(c) See *ante*, p. 60.

(d) Best on Pres. § 82.

(e) As it is difficult to draw a plain line of demarcation between even these two degrees, the *comparative* expressions as literally translated from the Latin, seem to indicate the true principle of the division more accurately than the positive ones, *slight* and *strong*.

(f) See the next note. According to *Domat*, presumptions are of two kinds; *strong* presumptions, amounting to a certainty, and *conjectures*, which leave some doubt. Civil Law, part I, b 8, tit. 6, sect. 4, art. 2. This division pre-cedes that into presumptions of law and of fact. *Id.* art. 5 Mr. *Wills* divides presumptions into violent or strong, and slight. Circ. Evid. 25.

(g) *Præsumptio levior movet suspicionem, et judicem quodammodo in-*

son is found to have come to his death by violence, and it is shown that another had a pecuniary interest in his death, or had a previous quarrel with him, and threatened to kill him, (a) this fact, though calculated to excite suspicion against the latter, is, without other proof, insufficient even to put him on his defence. (b) The presumptions of guilt, in these cases, are of a description which might be compared to the "light or temerary" presumption of Lord Coke, (c) having individually no weight to convict the accused. They have been otherwise termed "simple presumptions," (d) "mere naked presumptions," (e) and "conjectures." (f) To the same class belong presumptions from foot-marks on the snow or ground near the scene of a crime, and from the mere possession of the fruits of crime, a long time after its commission. (g) The weakness, or rather the total want of force of these slighter presumptions, in a judicial point of view, arises, it will be seen, from the circumstance of their *standing alone*, and unsupported by others. The moment additional facts are shown to have existed in the same case, giving rise to additional presumptions against the accused, though individually of the same slight kind, a *chain* or *body* of evidence begins to form; and from the mere circumstance of the concurrence or coincidence of such presumptions, bearing upon one point, or in one direction, and mutually aiding each other, they acquire a force and weight eventually

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climat,) *sed per se nullum habet juris effectum, nec onere probandi levat.* Hub. Præl. Jur. Civ. lib. 22, tit. 8, n. 15. Matth. de Prob. c. 2, n. 1, p. 77.

(a) See these circumstances particularly considered, *post*, Part II.

(b) Best on Pres. § 41. 3 Benth. Jud. Evid. 188. Domat's Civil Law, Part I, b. 8, tit. 6, sect. 4, art. 1, 4.

(c) *Ante*, p. 60, note (f).

(d) Pothier on Obl. p. 4, c. 8, sect. 2, § 8.

(e) Holroyd, J. in *Rex v. Burdett*, 4 B. & Ald. 189.

(f) Domat's Civil Law, p. 1, b. 8, tit. 6, sect. 4, art. 2, 4.

(g) Best on Pres. § 41. See these circumstances particularly considered, *post*, Part II

sufficient, not only to shift the burden of proof, but in some cases to amount to proof of the most convincing kind. (a) This will be more fully illustrated in the sequel of the present work.

A *strong* presumption of fact, (*præsumptio fortior*), is one which, in the language of *Huberus*, determines the tribunal in its belief of an alleged fact, without, however, excluding the belief of the possibility of its being otherwise: (*determinat judicem ut credat rem certo modo se habere, non tamen quin sentiat eam rem aliter se habere posse.*) (b) Its effect, therefore, is to shift the burden of proof to the opposite party, and if this proof be not made, the presumption is held for truth; (*ideoque ejus hic est effectus, quod transferat onus probandi in adversarium, quo non probante, pro veritate habetur.*) (c) The recent possession of stolen goods, by an accused person, raises a *strong* presumption that he is the thief; it puts him upon his defence, and calls upon him to show how he came by them; and, in the event of his failing to do so, satisfactorily, it justifies the final and absolute presumption of his guilt. (d) Presumptions of this nature are entitled to great weight, and, where there is no other evidence, are generally decisive in civil cases. In criminal cases, and more especially capital ones, a greater degree of caution is, of course, requisite; and the technical rules regulating the burden of proof cannot be always so strictly adhered to. (e)

A strong presumption of fact is scarcely distinguishable

(a) Pothier on Oblig. p. 4, c. 8, sect. 2, § 8. Dig. 22, 8, 26. Huberus, Præl. Jur. Civ. lib. 22, tit. 8, n. 4, 16. Carpzovius, Praet. Rer. Crim. quæst. 228, n. 57. Best on Pres. § 84, note. 8 Bl. Com. 871; Christian's note.

(b) Hub. Præl. J. C. lib. 22, tit. 8, n. 16.

(c) *Id. ibid.*

(d) Best on Pres. § 85. 1 Stark. Evid. 488, 509. *Id.* 488, 484, note. 1 Phill. Evid. 447. 1 Greenl. Evid. § 84.

(e) Best on Pres. § 86.

from a rebuttable presumption of law. (a) Indeed, in some cases, the same presumption has been referred to both heads. (b)

From what has been said, it will appear that presumptions of fact, properly so called, never rise above the general grade expressed by the word "strong." (c) What are sometimes called *necessary* presumptions, (d) where the facts proved compel the mind at once to a conclusion, without the liberty of exercising the faculty of the judgment, are strictly, as we have before seen, no presumptions at all; the result arrived at having the quality of actual certainty. (e) The evidence, in such cases, is not *presumptive* but *circumstantial*, the latter epithet being used in a distinctive sense. Or, as it has otherwise been designated, it is circumstantial evidence of the *certain* kind. (f)

The value of presumption, and, indeed, the necessity of relying upon it, as a means of discovering truth in general, and as a basis of conduct in most of the concerns of life, have been sufficiently shown under a previous head. The same considerations which demonstrate the value and neces-

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(a) Best on Pres. § 87.

(b) The presumption, last mentioned, of a felonious taking of property, from the fact of recent possession, has sometimes been called, a presumption of law, or, at least, treated as such. Best on Pres. § 87, note. But it is obviously a presumption of fact. *Id.* § 85. 8 Stark. Evid. 1239, note. *Id.* 1245.

(c) The indefinite signification of this word, however, admits of various degrees, the presumption, in some cases, being stronger than in others; and, when at its highest point of strength, being regarded as conclusive, or equivalent to moral certainty. See Puffend. Law of Nat. & N., b. 1, c. 2, sec. 11.

(d) The "violent" presumption of the old common law, seems to have been of this character, although some writers make a distinction between *violent* and *necessary*. Wills on Circ. Evid. 25. The terms are used in close connection, and as descriptive of each other, both by *Gilbert* and *Blackstone*. And the example given by *Coke* seems to have been intended to exclude every conclusion but the one indicated.

(e) See *ante*, p. 85.

(f) See these significations considered, *post*, Chapter III



sity of this mental process, in its application to any ordinary subject of research, apply with equal force to its employment in judicial investigations, especially in criminal cases. Crime itself is a fact which, in comparatively few instances, becomes the subject of full and absolute knowledge, through the medium of positive proof. Indeed, a principal aim of criminal action, in some of its most atrocious forms, and one to which its most earnest endeavors are constantly addressed, is to *cut off, in advance*, this very source of knowledge. The exclusion of human observation is, generally, to him who meditates a crime, especially one of magnitude, a matter of equal importance with its actual commission. Hence, *secrecy* is found to be a characteristic of his movements in all their stages;—those of plan, of execution, and of after action;—sometimes carried to the length of destroying all traces of the crime, but always directed to the effectual concealment of the criminal. It is to baffle these endeavors, to penetrate this veil, to track out the guilty agent by means of *circumstances* which, by a providential arrangement, are often beyond his power to suppress or destroy, that courts of justice, in the absence of positive evidence, resort to a process indicated and dictated by nature herself,—that of presumption founded on facts. Cut off, by the criminal's own contrivance, from the power of pursuit in the *direct* course, their action necessarily assumes the *indirect* form; which, though it may, in some cases, lead them by circuitous paths, and over difficult ground, frequently proves competent to bring them ultimately to the point desired.

The propriety and reasonableness, (to say nothing of the necessity) of such a course, are sustainable by many obvious analogies and considerations. Indeed, it is in processes which imply and involve investigation, deliberation, the exercise of reason, judgment and discretion, the patient and laborious extraction of one principal truth from a multitude of minor particulars, that the functions of a jury find their

largest and most appropriate exercise. Exclusive of these processes, there is comparatively little room or occasion for intelligent discretionary action on the part of such a tribunal. Where evidence is full and positive, juries have only to hear, and then, provided credence be given, to find in exact conformity with it. In such cases, their verdicts, instead of being the conclusions of deliberate, reflective, independent judgment, are the merely formal findings of prescribed results. (a)

But it is not exclusively on views of abstract propriety or adaptation to a supposed end, that the employment of presumption, as a basis of judicial action, may be justified. Ever since the institution of courts of justice among civilized nations, of which any record can be traced, it has actually and constantly been resorted to, as an efficacious means of discovering the truth of disputed facts; (b) and it continues to be freely employed for the same purpose, in the tribunals of our own time and country. Every day are criminals found guilty on evidence which derives its convincing effect solely from the presumptions it serves to raise. (c) Indeed, the necessity of convicting upon this basis is obvious, undeniable, and, in fact, for the most part, unquestioned. (d)

There is one class of crimes, however, in which the moral right to convict on the basis of presumption has been strenuously denied; those, namely, where conviction involves the

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(a) The nature of a trial before a jury, as implying protracted investigation, and the constant use of the presumptive process, was illustrated with much force and aptness, in the argument of the Solicitor General, in the case of *John Barbot*, A. D. 1758. 18 Howell's State Trials, 1229, 1297—1299.

(b) For the early use of presumption in England, see the quotation from Bracton, *ante*, p. 62, note (d). And see Hume's Commentaries, Trial for Crimes, vol. 2, c. 15, p. 287.

(c) See the observations of Best, J. in *Reg v. Burdett*, 4 B. & Ald. 95, 122; and of Bayley, J. *Id.* 149.

(d) See the observations of Shaw, C. J. in *Commonwealth v Webster*, Bemis' Report of the Trial, 462.

infliction of the punishment of *death*. (a) The grounds of this denial are, in brief, the *possibility of error* in the conclusions arrived at; and the injustice of inflicting in such cases, a punishment which, in the event of such possibility proving to be reality, becomes an *irreparable* injury. What is demanded as a safe basis of action, is that absolute certainty in the conclusion which is supposed to be derived from what is called "positive proof," or, in other words, the testimony of *eye-witnesses*. That very description of evidence is thus insisted on, which criminals, as we have seen, are so constantly desirous and determined that society shall not possess, and in excluding which, their efforts are so frequently successful. The requirement virtually is, however absurd may be the statement of it, that the most atrocious of crimes shall be perpetrated in the most open manner; and, failing this indispensable condition, immunity from punishment is, practically, proclaimed. The effect of the whole argument is to require, on the one hand, the establishment of what is, in most cases, an actual impossibility, in order to meet and extinguish the mere abstract possibility which is so much regarded on the other.

It is not difficult to see that this argument rests essentially upon grounds of sentiment, rather than of reason. The objection it presents, springs from a tender regard to the highest of human interests, and a reluctance to inflict what might, perchance, prove to the individual concerned, an injury not only extreme, but irreparable; (b) sentiments in themselves worthy of commendation, but capable, as in

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(a) See Brackenridge's Law Miscellanies, 505, 506. And see the subject as further pursued in Chapter V. *post*.

(b) The objection, though nominally to the mode of *proof*, is substantially to the mode of *punishment*. It is resolvable into a denial of the moral right to punish capitally in cases where the accused has been convicted on circumstantial evidence; and this form has been given to it, in so many words, by the late Mr. Justice Brackenridge. Law Miscellanies, 505, 506.

this instance, of being carried to lengths inconsistent with the order and safety of society. It demands for an arraigned prisoner, in that solemn contest between him and the community, represented by a criminal trial, not only the full advantages which the law allows,—the great preliminary advantage of being presumed innocent until proved guilty, and the equally important final one of being allowed the benefit of all reasonable doubts,—but the still greater, and, in all cases, overwhelming advantages which would at once arise from the exclusion of evidence of the presumptive kind. It overlooks, or, at least, regards as of inferior moment, the important considerations that society has, on these occasions, rights and interests which it is bound to protect; that it is for this very purpose of protection, that the court is organized and the individual arraigned before it; that the trial is confessedly and primarily undertaken, not to aid the prisoner to prove his innocence, (although that is a privilege consequentially and necessarily involved in it,) but to enable the community to establish his guilt; that, in fine, the whole necessity for judicial action, in any criminal case, springs from the act of the individual, not that of society; and that the entire procedure of arraigning, trying, convicting and punishing him, though aggressive in its form, is defensive, in substance and effect.

It may be worth while to dwell, for a moment, upon some of the most prominent features of the theory which the objections just considered tend to establish. Instead of a practical basis, composed of the great mass of facts and realities with which the administration of justice is, and has always been compelled to deal, it substitutes one made up of abstract possibilities, sustained by an occasional and exceptional actual case. It reverses, by the mere effect of speculation, the accumulated results of the reason and experience of mankind. It casts off a means, and often the only means of discovering truth, because, though tested by innumerable

experiments, as a safe and efficacious instrument, it is not absolutely and invariably perfect and unerring in its consequences. But it is hardly necessary to observe that to refuse to act, because such action, however imperative, may *perchance* be fruitless or injurious, would be as suicidal in the community, as it has been shown to be in the individual. The inevitable and vital necessity of acting upon presumption, has been simply but most powerfully illustrated by the example before cited from *Locke*. (*a*) Nor does the magnitude of the interest involved—even that of life and death—serve to vary the rule in the least, except to render action under it correspondingly cautious and deliberate. Life is frequently and justifiably taken by individuals, upon the strength of mere presumption. The man who kills an adversary whom he sees advancing rapidly upon him, with a murderous weapon uplifted in act to strike, he having no opportunity of escape, or strength to repel the assault, acts upon the imminent and overwhelming *probabilities* of the case. He *judges*, on the instant,—and does not wait for an impossible *knowledge*—that his life is in danger. And yet it might be, it is obviously consistent with *possibility*, that his life would not have been taken, had he passively awaited the result; that the whole demonstration of the supposed assailant, however violent and alarming to the eye, was or was intended to be mere menace; or, if really intended to harm, would have been checked by a sudden change of purpose, before the blow was actually struck.

The *speculative* character of the objections to convicting, in capital cases, on presumptive grounds, has already been adverted to. (*b*) They obviously rest on an overstrained idea of the responsibility attached to judicial action, and a

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(*a*) Human Understanding, b. 4, c. 14, s. 1.

(*b*) These objections have sometimes been placed on a supposed adequate basis of actual facts, and invested with a popular character, as will be more particularly shown in a subsequent chapter.

conscientious dread of incurring the guilt of blood as the consequence of error. Hence the demand of an impracticable certainty, so much at variance with the whole current of human experience. To the advocates of such views, it may be enough to say, in the language of a writer whose *humane* tendencies on the subject of punishment will not be questioned,—“moral certainty is only *probability*, but which is called certainty, because every man of sense assents to it necessarily, from a habit produced by the *necessity of acting*, and which is anterior to all speculation. The certainty which is necessary to decide that an accused person is guilty, is the very same which determines every man in the most important transactions of life.” (a)

To relieve the mind from the distressing embarrassment so inevitably resulting from these speculative views of the duty of human tribunals, it is sufficient to recur to certain great leading facts, or self-evident propositions, which, in the language of the writer just quoted, are precedent and paramount to all speculation, and which lie at the foundation of the administration of criminal justice, as it must necessarily be conducted among men. It is sufficient to know that crimes are committed; that the safety of society demands their punishment; and that the proof requisite to this end must be of a kind adapted to the present condition of human knowledge, and the known principles of human conduct. (b) It is with special and express reference to these same practical objects and considerations, that the tribunals themselves

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(a) *La certezza morale non è che una probabilità, ma probabilità tale che è chiamato certezza, perchè ogni uomo di buon senso vi acconsente necessariamente per una consuetudine, nata della necessità di agire ed anteriore ad ogni speculazione; la certezza che se richiede, per accertare un uomo reo è dunque quella che determina ogni uomo nelle operazioni più importante della vita.* Beccaria, dei Delitti, c. 14. Mr. Starkie cites the original as here given. 1 Stark. Evid. 445, note. The common American translation of Beccaria, (Phil. ed. 1819,) has been slightly departed from in the text.

(b) *Best, J. in Rex v. Burdett*, 4 B. & Ald. 95, 123.

are so carefully constituted by the law : that the power to convict, in capital, as in other cases, is confided and solely confided to men taken from the mass of society, and accustomed to follow, in their own daily avocations, the dictates of a sound judgment, and of that "common sense," which is declared to be the peculiar instrument of all natural presumption. A tribunal of this character, whose impartiality is secured by the forms provided for that purpose, is always sufficiently disposed, from obvious sympathies, to act humanely and liberally towards an accused party, while it is, at the same time, suitably impressed with the necessity of acting firmly in behalf of society. It is rarely apt to shrink from the performance of a duty, where it is clearly seen, out of mere dread of the consequences of possible error. Indeed, the whole notion of responsibility attaching, in such cases, to the tribunal, in any other sense than as it attaches to judicial action upon any kind of evidence, is obviously a mistaken one. If, after all the pains taken to prevent an erroneous conclusion, all the rules and limitations which experience has provided for that purpose, and all the advantages allowed the accused in furtherance of the same end, error should, in fact, ensue, it is to be taken as the unavoidable accompaniment of necessary action, an accident inseparable from the present constitution of human affairs, and the limited powers of the human mind. (a)

Finally, the necessity of presumption, as an aid to judicial action in capital cases, is demonstrable from the very use which, in such cases, is constantly, and without hesitation, made of direct or positive evidence itself. It is not difficult to show that, even in this, there always lurks the same dangerous element which is so much dreaded in evidence of the presumptive kind, to wit, the possibility of error. It is clearly possible that a witness, testifying to what he himself

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(a) Romilly's Obs. on the C. Law of England, p. 74. Wills on Circ. Evid. 246 Gibson, C. J. in *Commonwealth v. Harman*, 6 Am. Law Journal, 123.

saw, may not represent the truth, either through mistake or from design : and this is not only abstractly possible, but is shown to have been in many instances the actual fact. But this consideration is never, in itself, allowed to impair, for a moment, that confidence in the accuracy and veracity of witnesses, which is felt to be an indispensable general condition to the effect of any testimony. The witness is *presumed* to speak the truth, until his veracity is impeached, or his inaccuracy proved. So that, after all, it is by presumption itself that the tribunal is saved from speculative doubts, which, if indulged, would exclude all proof by witnesses, and thus render the administration of justice impracticable.



## CHAPTER III.

### CIRCUMSTANTIAL AND PRESUMPTIVE EVIDENCE.

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HAVING considered the nature of evidence and of presumption, and also seen how circumstances compose the materials of the former and the basis of the latter, we are now prepared to consider these several subjects in combination, as they constitute what is called *circumstantial* and *presumptive evidence*.

It has already been remarked that the terms “circumstantial” and “presumptive” are often used indifferently, to denote the same kind of evidence, namely, that which is not direct and positive. (a) In strictness, however, the terms are by no means entirely convertible. It is not all evidence derived from circumstances, which authorizes that particular kind of inference known as a presumption. (b) Presumptive evidence is a species of circumstantial evidence, (c) though so large a species, as to be practically almost co-extensive with its genus, and this explains why it is so frequently regarded as identical with it. The true import and relation of the

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(a) See *ante*, p. 7. 1 Stark. Evid. 478, 481. 1 Phill Evid. 486—440.

(b) Evidence may be circumstantial without being presumptive, in two senses: it may fail to raise any adequate presumption; and, on the other hand, the inference to which it leads may be much stronger than any mere presumption; being of the necessary kind, as will be explained on a subsequent page. As to the former, see Wills on Circ. Evid. 16, 17.

(c) *Id. ibid.*

terms may be shown by a few additional explanations, which, it is hoped, will not be deemed superfluous.

*Circumstantial* evidence is only another name for that kind of evidence which has already been described as *indirect*. (*a*) It is evidence composed of circumstances, or relative facts, bearing indirectly on the fact in issue, or which is sought to be proved, and requiring, in its application to such fact, a process of special inference leading to the conclusion desired.

Sometimes, this conclusion is of a kind which follows, *necessarily*, from the fact or facts presented by the evidence. Thus, where a person is found dead, with a recent mortal wound causing great effusion of blood, and the print of a bloody *left* hand is discovered upon the *left* arm, the conclusion is that another person, besides the deceased, must have been present at or after the time the wound was inflicted. (*b*) This is a necessary consequence of the appearance observed; a fact which must be believed, although no living human eye may have seen such person. It is a necessary consequence of the laws of nature; (*c*) it being impossible, in the nature of things, that the mark could have been made by the deceased. So, on the other hand, where, on a trial for an alleged crime involving the personal presence of the accused, it is conclusively proved on his part, that, at the very time when it is charged to have been committed, he was in another place, the conclusion follows, necessarily, that he could not have been the perpetrator. (*d*) The fact inferred in each of these cases is a self-evident proposition: it is certainly known to be true, and not merely presumed to be so.

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(*a*) See *ante*, p. 4.

(*b*) Case of *Mary Norkott* and others, 14 Howell's State Trials, 1324. Best on Pres. § 205. 1 Greenl. Evid. § 18 a. *Shaw*, C. J. in *Commonwealth v. Webster*, Bemis' Report, 468.

(*c*) Best on Pres. §§ 11, 186.

(*d*) *Id.* § 7. More familiar illustrations of proof by this species of indirect

Hence, the evidence which gives rise to it is called *certain* circumstantial evidence. (a)

But it more commonly happens that the conclusion drawn from the circumstances presented by the evidence, does not necessarily follow, but is *probable* only, and is obtained by a process of reasoning. (b) Thus, to take the example first above given, the facts shown do not necessarily lead to the conclusion that the person found dead was murdered, or that the person, the mark of whose hand is discernible on the body, was the murderer. It may have been a case of suicide, and whether a case of suicide or murder, the hand may have been that of a friend, attempting to prevent the commission of the act, or to afford relief after it. (c) Which of these suppositions is to be considered the truth, depends upon a process of probable reasoning, founded upon the facts shown, in connexion with such other circumstances as may be ascertained in the case. Thus, it is natural and reasonable to suppose and expect that, had the person present been a friend, he would immediately make known the circumstances, and readily offer himself as a witness for that purpose. The entire absence of any such person or disclosure would tend to destroy the supposition of a friendly presence, and thus to confirm the opposite supposition of murder. If the instrument of death were found lying at such a distance from the body, and in such a position, as to render it improbable that it could have been used by the deceased, this circumstance would tend to strengthen the same supposition. The nature and number of the wounds inflicted would also be very important circumstances. The conclusion arrived at, by such a course of reasoning, may be exceedingly strong and

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evidence, are given in the charge of the presiding judge to the jury, in the case of *The People v. Boline*, 4 New York Legal Observer, 90, 91.

(a) 1 Greenl. Evid. § 18 a. And see 6 Lond. Law Mag. 373.

(b) 1 Greenl. Evid. § 18 a.

(c) *Id. ibid.*

convincing ; but, from its wanting the quality of absolute and manifest certainty, the evidence from which it is drawn has been called *uncertain* circumstantial evidence. (a)

It is easy to see that the process of reasoning just described is nothing more than one of presumption. Hence, the evidence on which it rests has been accurately termed "*presumptive* circumstantial evidence." (b) But, as it cannot be presumptive without being circumstantial, the simple epithet "presumptive" seems to designate, with sufficient precision, the species in question, the nature and effect of which will now be more particularly described.

*Presumptive* evidence is, in brief, evidence presenting facts from which that particular kind of inference, already described as a *presumption*, may be drawn, as to the existence of other facts. In other words, it is that species of indirect evidence which, when presented to the mind, in connection with any fact sought to be established, suggests or induces, with more or less force, a presumption or belief as to the truth of such fact ; that is, that it is either true or false ; that it has or has not existed ; that it will or will not take place ; (c) and when the effect of such evidence is satisfactory and convincing, it is termed "presumptive

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(a) 1 Greenl. Evid. § 13 a. A writer in the London Law Magazine for October, 1831, states the distinction between certain and uncertain circumstantial evidence, in the following terms : it is "certain, when the existence of the fact in dispute is a necessary condition for the existence of the fact attested ;" it is "uncertain, when the fact in dispute is a natural effect of the fact attested, but may likewise have been caused by other things." 6 Lond. Law Mag. 373.

(b) See the report of the judge's charge to the jury, in the case of *The People v. Bodine*, 4 N. Y. Legal Observer, 91.

(c) Circumstantial evidence, whether of the certain or presumptive kind, may be, and constantly is used negatively, as well as affirmatively ; to establish the non-existence, as well as the existence of facts ; the falsity, as well as the truth of propositions ; and hence it may, and often does have the effect of *disproving*, as well as proving a fact proposed, or alleged and sought to be established ; whether formally questioned by an actual disputant or otherwise. But however it may be employed, and whether on one or the other side of a formal

proof." (a) The mental act, in such cases, is an inference or deduction; and it is an inference not yielded to, as a necessary and inevitable consequence, but drawn by a process of *probable* reasoning. The faculty employed in this process is the judgment; and the result of its exercise is an impression or conviction of the *probability* of the fact to be proved; such probability varying in degree, from the slightest, up to that high degree which is usually termed *moral certainty*. (b)

Probability, therefore, as distinguished from absolute certainty, is the true foundation of the judgment exercised in inferring, by this presumptive process, the truth of any fact proposed, from evidence of other facts submitted. It is the great source of belief in all investigations of human conduct which, from their nature, do not admit of the certainty of proof flowing from demonstrative evidence; (c) and hence is largely and necessarily relied on, in trials of fact before judicial tribunals. (d) Indeed, the assurance produced by direct evidence itself, has been well described as nothing more than a high degree of probability. (e) And so rare

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question or issue, the great ultimate result at which it always aims, or professes to aim, in common with direct evidence, is invariably an *affirmative* one,—the discovery and establishment of truth.

(a) 1 Stark. Evid. 481.

(b) Moral certainty is defined by *Puffendorf* to be nothing more than "a strong presumption, grounded on probable reasons, and which very seldom fails and deceives us." Law of Nature and Nations, b. 1, c. 2, s. 11.

(c) 1 Greenl. Evid. § 1. Hence, evidence of the presumptive kind is termed by a great reasoner, "*probable* evidence." Butler's Analogy, Intr. It is also constantly termed "*moral* evidence." 1 Greenl. Evid. *ubi supra*. Wills on Circ. Evid. 5. "To us," says *Butler*, "probability is the very guide of life." Anal. Intr. And presumption itself has been resolved into "the weighing of *probabilities*." *Best*, J. in *Rex v. Burdett*, 4 B. & Ald. 124.

(d) 1 Stark. Evid. 450. Lord Chief Baron *Gilbert* calls the rules by which evidence offered to a jury ought to be weighed and considered, "rules of *probability*." 1 Gilb. Evid. 1.

(e) 1 Stark. Evid. 450

are the cases in which absolute certainty of conviction is attainable, that a distinguished writer on judicial evidence has not hesitated to lay down the broad proposition, that *the rights of men must be determined by probability*. (a)

Probability, in this sense of the basis of judgment on evidence, has been well defined to be "the likelihood of a proposition or fact being true or false, from its conformity or repugnancy to our general knowledge, observation and experience." (b) More briefly, it is likeness to truth, or *verisimilitude*; (c) the nearest approach to absolute truth, which the limited faculties of the human mind in many cases admit. (d)

The process by which this probability is made apparent, and the truth of the fact sought indirectly established by inference from the facts known or proved, has already been sufficiently explained under the preceding head of presumption. (e) Its foundation has also been shown to consist in the *connections* previously observed to exist between facts, arising from a conformity to certain general laws by which the phenomena of nature and the conduct of men are known to be uniformly or usually regulated. It is essentially a process of *comparison*; the facts presented in the particular case being compared with the general results of previous knowledge or experience. (f) A principal fact having been found, in numerous instances, to have been accompanied by certain minor facts; and the same minor facts being again

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(a) 1 Gilb. Evid. 2. So, a higher judicial authority has said that "judges and all mankind," in forming their opinions as to the truth of controverted facts, must be governed "by the rules of probability." Lord Mansfield, in the *Douglas case*, cited *ante*, p. 23.

(b) Locke on the Human Understanding, b. 4, c. 15, ss. 8, 4. See various definitions of probability, in Wills on Circ. Evid. 5.

(c) Butler's Anal. Introd.

(d) Seneca de Beneficiis, lib. 4, c. 38; cited *ante*, p. 25, note.

(e) See Chapter II.

(f) Butler's Anal. Introd.

made to appear, or proved to have existed, in the case under investigation; the principal fact, though otherwise wholly unknown, is, by the mere effect of such association, inferred to have existed in the same case, also. It is also, in most instances, a process of investigation of *causes*, or, an assignment of probable causes to known effects; whether such effects be of a physical or moral nature. Finally, it is, to a great extent, a process of reasoning from *analogy*; facts or events of a similar character being referred to causes of a similar kind. (*a*)

The following may be taken as familiar illustrations of what has just been observed. It is known by constant experience, as well as from reason, that impressions made by one material substance upon another, correspond accurately, where they are distinct and permanent, with the form and surface of the impressing substance. Hence, where impressions of human footsteps on earth or snow, having certain peculiarities, are found on comparison to correspond accurately with the shoes of a particular individual, having precisely the same peculiarities, the inference or presumption is that such impressions were actually made by the shoes of such person, (*b*) leading to the further inference of the presence of such person at the place where the footmarks are found. Again, it is known from observation, that the surface of iron, when exposed to the direct action of fire, becomes discolored; and that a bar of iron exposed to such action, in certain parts, and protected against it in others, becomes discolored in the former only. Hence, where the bolt of a door, which has been exposed to the action of fire, is found to be discolored only in certain parts, it is inferred that the parts not discolored were protected by their position at the time; and this leads to the further inference or pre-

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(*a*) See Wills Circ. Evid. 11, 12.

(*b*) See further, as to coincidences. *post*, Chapter IV.

sumption as to the question whether the door was or was not bolted, at the time of the fire. (a) These cases present correspondencies of a *physical* or material kind ; but the same kind of reasoning is equally applicable to circumstances of a *moral* character. Thus, guilt is known to have certain *indicia* or badges almost invariably attached to it ; such as attempts to hide a crime committed, to escape from apprehended punishment, and the like. When, therefore, it has been shown by evidence, that a certain person has attempted to hide the dead body of another, upon which marks of violence are discovered ; or was seen, on the approach of a third person, to fly from the place where the body was found ; or has fled or concealed himself, in such a case, from the pursuit of justice ; the reasoning is, to attribute such conduct to the cause or motive known to actuate the guilty, under such circumstances ; and the probable inference therefore is to connect the individual with the crime, as author or participator.

This process of probable reasoning, or presumptive inference, may be based upon a *single* fact, as well as upon *several*. In practice, however, it rarely happens that a single fact presents sufficient ground for the formation of a satisfactory judgment. (b) It is seldom, indeed, that any principal fact, or fact sought to be proved, is associated with only a single circumstance, so weighty in itself, and so forcibly indicative of the former, as to justify the inferring it from such circumstance, unsupported by any other. In the vast majority of cases, the principal fact is surrounded by a variety, sometimes a multitude, of circumstances, or minor facts, bearing various relations to it ; and all constituting, with it, the case under consideration ; and it is always

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(a) See the remarks of the presiding judge, in his charge to the jury, in the case of *The People v. Bodine*, as reported in 4 N. Y. Legal Observer, 92.

(b) See 8 Benth. Jud. Evid. 12, 13.



the main object of the investigator, to possess himself of as many of these circumstances as possible.

Where several facts are thus presented in evidence, each is to be examined, to ascertain its bearing on the fact sought to be established, and each, if relevant, will be found to have its share of influence in producing an ultimate resulting impression of the probability or improbability of the truth of such fact. The process of reaching this ultimate conclusion, however, will be found to vary, according as the evidentiary facts or circumstances are found to be in *harmony*, or otherwise. Accordance or mutual consistency, it may be observed, is their natural and proper condition; and always follows, as a matter of necessity, where they are all placed before the mind exactly as they occurred; for it is undeniable that unless they had been consistent, they would not have occurred. (a) In these cases, the conclusion is reached by connecting and combining all the circumstances together into one body, and contemplating them as they unitedly tend toward or indicate such conclusion. And this process may be called an imitation of nature. It is a re-construction of the case, as far as may be possible, out of the very elements which originally composed it.

But it does not always happen that facts or circumstances, constituting a body of evidence, present themselves in this their natural state of accordance and harmony. They are sometimes found to be *discordant*, pointing to different conclusions; and sometimes in actual *conflict*, pointing to opposite conclusions. This condition of the facts is an unnatural one, and is always occasioned by imperfection in the evidence itself: some actual fact being either omitted or untruly represented, or something being represented as fact which

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(a) "Truth," observes Mr. *Starkie*, "is necessarily consistent with itself; in other words, all facts which really did happen, did actually consist and agree with each other." 1 *Stark. Evid.* 20. See *Id.* 482. And see 1 *Greenl. Evid.* § 12.

was not so. The great object of endeavour, in such cases, is to ascertain, if possible, the cause of the apparent disturbance or inconsistency, so as to explain and remove it, and thereby to restore to the facts their natural capacity and tendency of being harmoniously combined into one connected whole, excluding and rejecting every thing fabricated. (a) But where this process proves to be impracticable, the only alternative method of arriving at any definite conclusion, is by the complex process of first *separating* the facts into two divisions,—those which tend to establish the probability of the ultimate fact sought, and those which tend to show its improbability ;—and then, by *weighing* the one against the other, to ascertain on which side the final preponderance of probability lies; and to adopt the conclusion according with such preponderance. (b)

It will be seen, in the sequel of this work, that in a very important class of cases, constituting its particular subject, this *weighing of probabilities* is not allowed; the probability required as the basis of judgment, being of that high kind which excludes any counterpoising or opposite probability altogether. Nor is even this regarded as sufficient, without being raised to the still higher grade of *moral certainty*, by means of *tests*, which have already been generally described, and will be more fully explained under another head. (c)

Such is an outline of the nature and practical operation of that species of circumstantial evidence, known as *presumptive*; and it is this species which is found, in practice, to constitute its most common variety. It is comparatively rare that the evidence presented in any case is wholly of the *certain* kind, leading to necessary inferences, and irresistibly forcing the mind to an ultimate conclusion; which is thus

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(a) See 1 Stark. Evid. 530—532.

(b) See *Id.* 533. As to the process of weighing probabilities, see further *ante*, p. 23. And see Wills, *Circ.* Evid. 9.

(c) See Chapter IV.

made, in the exaggerated language of the civil law, "clearer than light." (a) On the other hand, cases where the evidence is entirely presumptive, are of constant occurrence. It sometimes happens that both kinds are presented in combination, and, in this way, necessary inferences come to be mixed up with probable ones. But the proportion of certain evidence is usually small; and where the inferences deducible from such portion are (as for the most part happens,) only intermediate, leaving an ultimate conclusion still to be drawn from the combined mass, such ultimate conclusion is always drawn by a presumptive process.

In the present chapter, circumstantial evidence is intended to be presented in its widest range of application, without any particular reference or restriction to *judicial* subjects. This general view of it, however, is not always taken; it being a common error to consider its employment as a mode of reasoning or proving doubtful facts peculiar to courts of justice; whereas, as an accurate writer has observed, "it is nothing else than the common course of settling all questions which can be settled by argument, employed, whether knowingly or unknowingly, by all mankind." (b) It is the common basis of an intellectual process, called into exercise in almost every branch of human speculation and research. (c) The truth of divine revelation itself is, to a great extent, proved by circumstantial evidence. (d)

Evidence, in general, may be said to have its most effective and impressive application *in law*, because the results of that particular mode and course of application are of the most practical and important kind: it being always intended as a basis of *action*, and that, *coercive* action, going the length of forcibly depriving men of their liberty, property, char-

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(a) *Indiciis—luce clarioribus*. Cod. 4, 19, 25.

(b) 6 Lond. Law Mag. 868.

(c) Wills on Circ. Evid. 4. 1 Stark. Evid. 24, and note *ibid*.

(d) Butler's Analogy, part 2, chap. 7.

acters and lives. But questions of evidence are, by no means, confined to courts of justice. "They are," as Mr. *Bentham* has remarked, "continually presenting themselves to every human being, every day, and almost every waking hour of his life." (a)

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(a) 1 Jud. Evid. 18.

## CHAPTER IV.

### CIRCUMSTANTIAL EVIDENCE, AS AN INSTRUMENT OF JUDICIAL INVESTIGATION.

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THE nature of circumstantial evidence, as a means of discovering truth in general, the process by which it is applied, and the results deduced from it, have been sufficiently considered in the preceding chapters. It will now be examined with more immediate reference to its use, as an instrument of *judicial* investigation.

In this particular point of view, we see it applied exclusively to one class of subjects ; namely, to questions or issues as to matters of fact which have had, or are claimed to have had, an actual existence, raised and agitated by contending parties in courts of justice. Within these limits, we find it further subject to the operation of certain fixed *rules*, which, though they may abridge the extent of its natural range, serve, not infrequently, to add to its natural efficacy. Some of these rules are equally applicable to direct and indirect evidence ; being modifications of natural evidence in general, which the law always assumes to make. These may be reduced to the three following : the evidence must always be presented under the sanction of an oath, or its equivalent ; its production and statement may be compelled ; and its reception is invariably subject to judicial supervision, with a discretion to admit or exclude it. The more particular rules which govern the application of circumstantial evidence,

especially that of the presumptive kind, will be enumerated and considered under a future head.

Circumstantial evidence, then, in a judicial point of view, is evidence of certain facts or circumstances, presented to a jury on the trial of a cause, as a means of ascertaining the truth of a principal fact in issue, by the indirect mode of special inference or presumption; and which leads to necessary or probable conclusions, according to a distinction already explained. (a)

The general and radical signification of the term "presumptive," as expressive of a leading distinction between direct and indirect evidence, will not require to be again adverted to. But there is another and more limited sense constantly given to the term in practice, as descriptive of its actual operation and effect, which has not hitherto been considered. In this sense, *presumptive* is distinguished from *conclusive* evidence. In criminal cases, presumptive evidence is that which, while it justifies a belief of the truth of the fact to which it is applied, admits, nevertheless, of explanation or contradiction to any extent. It thus is, in itself, incomplete or inconclusive, having the true conditional or *contingent* quality of a presumption. *Conclusive* evidence, on the other hand, is that which either does not, in its nature admit of explanation or contradiction; such as has been called certain circumstantial evidence; or, if it does, has not, in fact, been explained or contradicted; having, in either case, the final and absolute effect of producing satisfactory assurance or conviction in the minds of the jury. In the former case, it is obviously and radically distinguishable from presumptive evidence: it is conclusive, in the first instance, without passing through the presumptive stage. In the latter, it is nothing but presumptive evidence, to which a conclusive effect has been given by the absence or insuffici-

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(a) See Chapter III.

ency of the evidence on the opposite side. (a) In other words, it is presumptive evidence, with its contingent or conditional quality changed into a final and conclusive one, by the operation of the circumstances under which it is presented. In criminal cases, it is essential that the evidence should be of a conclusive nature; (b) but, in the sense last considered, it cannot acquire this quality without first passing through the presumptive stage.

Again, presumptive is sometimes confounded with *primâ facie* evidence; although the latter term is more commonly used in civil proceedings. These two kinds of evidence resemble each other in their conditional or preliminary quality of standing good *unless* or *until* rebutted, contradicted or explained. But they differ in this important respect; that *primâ facie* evidence derives its effect from the judgment of the law, while presumptive evidence depends upon its natural force or efficacy, as it impresses the judgment of the jury. (c)

Before proceeding to the more particular consideration of the subject of this chapter, it may answer a useful purpose, to institute, in some detail, a comparison between the processes of judicial and philosophical inquiry, as they are con-

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(a) 1 Stark. Evid. 454.

(b) *Id.* 453, 454.

(c) See 3 Phill. Evid. (Cowen & Hill's notes,) Note 287. *Kelly v. Jackson ex dem. Morris*, 6 Peters, 622, 681, 682; cited *ibid.* Mr. Starkie draws a distinction between *primâ facie* and conclusive evidence, in the following terms. " *Primâ facie* evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor, that it must prevail, if it be accredited by the jury, unless it be rebutted or the contrary proved; *conclusive* evidence, on the other hand, is that which excludes or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established." 1 Stark. Evid. 453. " *Primâ facie* evidence," says another writer, " is evidence which if uncontradicted, or unexplained, is sufficient to determine the matter at issue. *Conclusive* evidence is evidence which, of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue." 6 Lond. Law Mag. 878.

ducted on the common ground of presumption from facts. This will serve to present, in a prominent light, certain peculiar characteristics of circumstantial judicial evidence, which might otherwise escape notice, while it will furnish a natural means of transition from the general views which have preceded, to the special considerations which are to follow.

In certain leading points of view, judicial inquiry, as conducted on the presumptive basis just mentioned, differs in no respect from philosophical research in general, or, indeed, from any earnest, intelligent inquiry concerning the affairs of ordinary life. It has the same *object*, the discovery of truth ;—the same *foundation*, evidence furnished by observed facts, as a basis of inference ;—and the same *principle*, presumption or induction from what is known to what is unknown. Hence, it has been well remarked by an able writer on the subject, that “it is clear that presumptive evidence, and the presumptions or proofs to which it gives rise, are not indebted, for their probative force, to any rules of positive law. When inferring the existence of a fact from others which have been already established, courts of justice (assuming the inference properly drawn,) do nothing more than apply, under the sanction of the law, a process of reasoning which the mind of any intelligent, reflecting being would have applied for itself, under similar circumstances.” (a) So, to use the words of an eminent American jurist, “the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle of its application.” (b) It is the observation of another writer on the same subject, that “it is upon this principle that all philosophical knowledge ulti-

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(a) Best on Pres. § 14.

(b) 1 Greenl. Evid. § 14.



mately rests ; except, perhaps, that part of it which relates merely to abstract numbers and quantities." (a) And again, that "the daily practice of investigating truth in our courts of justice, rests upon principles which form the basis of every rational system of philosophy." (b)

But in other and very important points of view, a trial at law, and more especially a criminal trial, differs widely from the philosophical investigations with which it has just been compared. The essential circumstance of its being a procedure enjoined and regulated throughout *by law*, and in which all who participate do so, for the most part, under coercion, presents at the outset a most material and obvious point of contrast. A trial is a *duty*, demanded by the highest interests of society. It is a practical duty, not called forth by the contemplation of abstract questions in morals, or remote objects in the physical world, but rendered necessary by the actual conduct of men, and contemplating immediate and retributive action against them. It is a public, official duty, performed, not in the seclusion of the closet, nor with a deliberation admitting months and years of progress ; but in crowded assemblages, before close observers, and necessarily limited, in its duration, to certain determinate periods. Finally, it is a solemn duty, constantly affecting the most vital interests of those against whom it is directed, and

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(a) 1 Stark. Evid. 24, note.

(b) 1 Stark. Evid. 24, 26, note. The same writer goes on to remark that, "in its great essentials, the system of evidence is founded upon the purest and most scientific principles; it rests upon no arbitrary or fanciful assumption; depends not upon the use of force and constraint, every species of torture being justly considered to constitute the worst test or guarantee of truth; it is founded upon the sober and discreet application of the reason and experience of mankind, to all the facts and circumstances upon which that reason and discretion can properly be exercised; assuming no other principle than that upon which the most rigid systems of philosophy must be founded; viz. that those associations and connections which have been pointed out and established by experience, will again occur." *Id. ibid.*

always conducted with public ceremonies indicative of its character.

All these considerations afford reasons of the strongest kind, why the *truth*, and the exact truth, should, if possible, be developed on these occasions. Hence it is that the law, at the very opening of a trial, not only formally propounds the investigation of *truth* as its great and only object, in terms of peculiar force and impressiveness, but imposes, as a guaranty of these results, the most solemn sanction under which men can be called to act. Hence the *oath* of the *juror*, who is the appointed investigator,—“well and truly to try” the issue submitted to him; or, in the language of the record, “to speak the truth” of the matters in issue: the verdict required of him being, in its most literal sense, a declaration of *the truth*. (a) But it is to the conduct of the *witness*,—the principal source of evidence, the main reliance of the *juror*, and the real foundation of the whole inquiry,—that the law looks with the most careful regard; and it is in framing the oath under which he is to speak, that it employs terms so pre-eminently and almost redundantly precise and impressive, as to have rendered them familiar even to common ears:—“the evidence which you shall give on the trial of this cause, shall be the truth, the whole truth, and nothing but the truth.”

But “the truth,” thus anxiously and publicly held up to view, and the attainment of which is so carefully enjoined as a solemn duty, is not absolute truth, which is free from all possibility of error; not that abstract and necessary truth which the mathematician seeks and finds; but *moral* truth, as developed by moral evidence, the essence of which, even at its highest point of impressiveness, is probability; and which has a quality, or, (if the expression be allowed,) an infirmity of *contingency*, from which it can never, by any

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(a) Verdict, Lat. *verdictum*; *veritatis dictum*. 8 Bl. Com. 377. See Burr. Law Dict. *in voce*.

human precaution, be effectually freed. The impression, therefore, which the result of a trial by circumstantial evidence,—at least, by that of the presumptive kind,—is to make upon the juror's mind, can never exceed the force of what is usually termed *moral certainty*, (a) the nature of which will be more particularly explained at the close of this chapter.

In this latter respect, there is a resemblance between the results of judicial investigation of crime, and those of certain philosophical inquiries,—such, namely, as relate to the phenomena of the natural world,—which has been noticed and commented on, by writers on judicial evidence. (b) There exist, also, between these two branches of research, further analogies worthy of consideration. Thus, they both have a common subject,—a past transaction, occurrence or event, which has had an actual, though merely transient existence; and they have a common immediate object,—the discovery of its cause; and, in the attainment of this object, they act upon the same general principle. But in all that relates to the particular mode and course of inquiry, and what may be called its external circumstances, the resemblance again fails, and further particulars of difference and contrast are found to present themselves. The most important of these will now be enumerated.

1. The philosophic inquirer deals with the particular cases which come under his observation, for the sake of, and with reference to some *general* truth to be eventually deduced from them. It is, moreover, a characteristic of the occurrences or events to which his attention is directed, that they are liable to be repeated in the same or nearly the same form, or happen again, under precisely similar circumstances. In fact, it is to the *recurrence* of a phenomenon, in some form

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(a) See 1 Stark. Evid. 450.

(b) See *Id.* 488, note. And *Id.* note to pp. 24–28. 8 Phill. Evid. (Cowen and Hill's notes) Note 285. 1 Greenl. Evid. § 11.

or other, that he constantly looks forward, and upon it that he often confidently relies, either to complete his observations, or to verify and confirm their results.

But the cases with which the judicial investigator,—the juror—has to deal, have not, in general, this quality or capacity of recurrence or repetition, in the same or similar forms. The same combination of circumstances which go to make up a case of crime, cannot, where they are at all numerous, be expected to occur again. And even if it could and did occur, it would answer no purpose; for it is the identical transaction which took place, and as it took place, which is to be the sole subject of inquiry. The investigator deals with the cases submitted to him, for their *own sake*, and for the express purpose of ascertaining the truth of every fact composing them; and not at all with reference to any thing that may happen or be discovered in future. He looks exclusively to the past, as well for the facts from which he is to reason, as for the experience which enables him to reason accurately. His object is not to establish a general principle, but to ascertain the existence or non-existence of a particular disputed fact. Hence, the very first step he is obliged to take, is actually to revive and recall his subject; to “retrieve” it (in the words of Lord Chief Baron *Gilbert*, (a)) from the “obscurity” into which it has fallen; to search for and collect the scattered facts which composed it, and to put them together, as nearly as possible, in their original connection. This must always be done, before the great business of trial,—examination and decision—can be intelligently entered upon. It is in this peculiar process of revival and re-construction, that the characteristic difficulties of judicial inquiry by means of circumstantial evidence, are found to consist, as may appear from the following further considerations.

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(a) 1 *Gilb. Evid.* 2. And see 1 *Stark. Evid.* 15, 28.

2. In the majority of instances, the philosophical investigator combines with the character of inquirer, that of *original observer*, also. He has himself witnessed the occurrence, the cause of which he seeks to discover. He has observed the phenomena, not only once, but repeatedly,—observed them as they occurred, and with the utmost deliberation and precision,—observed them for the very purpose of deducing a result. His impressions of them are direct, and therefore of a corresponding perfection. If he ever relies upon the observations of others, it is only such as he has found to be worthy of confidence, because made with the same care that he himself would have bestowed; and even these he sometimes prefers to repeat, and thus to test by his own personal observation. He reasons and draws his conclusions confidently, because he *knows* the facts upon which they are based.

But with the juror, the case is different. He knows, or is presumed to know nothing of the transaction into which he is called to inquire. He has not witnessed one—even the most trifling—of its component circumstances. For his knowledge of each of them, in its character of a past event, he must rely on the observations of *others*. (a) The law indeed, actually prohibits him from acting on his own personal knowledge. (b) If he be possessed of any fact important to be known, he must divest himself of the character of juror, and formally assume that of witness. (c) Hence

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(a) 1 Stark. Evid. 15, 28, 78, 79. It sometimes happens that facts of a certain permanent kind, such as material objects and substances which have been connected with the commission of a crime, are actually submitted to the juror's own personal observation, by being produced in court on the trial. So the place or scene of the crime itself is presented in a similar way; the jury being allowed to leave the court and view it, in order to obtain a clearer understanding of the testimony. But even these facts are always introduced and accompanied by the evidence of *witnesses*, which is essential to give them their proper connection with the case.

(b) 1 Stark. Evid. 449. 8 Bl. Com. 375.

(c) *Id. ibid.* 1 Stark. Evid. 449.

the witness becomes the indispensable adjunct and assistant to the labors of the judicial investigator.

This, then, is the peculiar characteristic of the juror's observation of facts; it is not original, but secondary. He observes with and through the organs or senses of the witness. He perceives the facts, not immediately, but after an interval: not actually and sensibly, but mentally, and only as the narrative of the witness brings them before him. (a) Hence, his observation is of an indirect, dependent, and therefore inferior kind.

3. Again, the disadvantage arising from the last consideration is often increased by the intrinsic character of the *observations* themselves, as originally made by the *witness*. The philosophical observer either actually goes in search of his subject, or, where it is suddenly presented to his view, arrests and keeps it before him, and in both instances, for the very purpose of examination. He observes with express reference to a specific object and result; and his pre-determination always is that his observation shall be complete and correct to the minutest particular possible. Accordingly, he makes it his especial business, and, for the time, his whole and exclusive business. He discharges from his mind every other subject, and suffers it to become absorbed in the contemplation of the one before him. Hence, coolness, deliberation and precision, are found to be the invariable accompaniments and characteristics of the whole process.

But the observer of the facts and appearances which constitute, or are connected with criminal action,—especially of those which precede or accompany the commission of crime,—the observer who is to appear in the future character of a judicial witness, often acts under very different circumstances, and in a very different frame of mind. Many of the facts and appearances just mentioned, (including

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(a) See, however, what is said in note (a) on the last page.

frequently some of the most important materials of evidence) not only present themselves to the senses, incidentally, unexpectedly and transiently, but are, outwardly, and as they present themselves, of the most ordinary and familiar kind, having nothing on their face to attract or arrest attention in any considerable degree; and not to be distinguished from the great mass of facts and events which are constantly passing before the eyes of men, in their daily public intercourse with each other. Hence, where they are perceived merely by the organs of sense, without any act on the part of the observer, to give them connection with himself, they are usually perceived in a general and superficial manner. The following may be mentioned as examples of this description of circumstances:—a person seen walking through a street, or approaching or entering a house: (a)—crossing a field, a ferry or a bridge, at a certain hour; (b)—seen at different points, by different persons; (c)—his size, dress, gait, movements, and the like. None of these circumstances are, or can be known, in their true and full relation and significance, until *after* the crime which they tend to indicate, has been committed. Hence, they are observed under imperfect, if not untrue impressions of their real character: they are observed *merely as ordinary* occurrences, and with no particular object in view, or none at all commensurate with what would be the object of observation, could the impending crime be, at the time, foreseen. And this arises from the unavoidable necessity of the case. Crime is a thing, in itself, unlooked for. The very idea of crime, in the abstract, is not willingly entertained, but rather repelled from the mind; the idea of it, as a possible, actual, impend-

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(a) *Commonwealth v. Webster*, Bemis' Report, 55, 211. *The People v. Colt*, New York Oyer and Terminer, before *Kent*, Circuit Judge, January, 1842; testimony of *J. Johnson*.

(b) *The State v. Avery*, before the Supreme Court of Rhode Island, May, 1883; testimony of *B. Manchester*, *W. Pearce, Jr.* and *G. Lawton*.

(c) *Commonwealth v. Webster*, Bemis' Report, 51—58.

ing occurrence, in connection with any ordinary circumstance, may almost be pronounced unnatural. Men do not walk the streets, nor labor in the fields, under the impression that a crime *may* be either in preparation, or in actual commission, in their vicinity, and that therefore it behooves them to keep every sense awake, to observe every possible circumstance or occurrence within reach, and to observe all accurately. The necessary avocations of human life would, of course, admit of no such thing. Indeed, the natural habit of the mind appears to be, to attribute occurrences, even out of the ordinary course, to *any other* cause than crime. Hence it is after a crime is committed, and has been discovered, that the observer is first effectually reminded and impressed that, at such a time and place, he witnessed such a circumstance, which is now, for the first time, seen to have a bearing on the transaction.

There are, however, certain facts and occurrences, preceding and accompanying the commission of crime, which, even at the time they present themselves to the view or sense of an observer, have an aspect or quality so remarkable as to render them the subjects of more than ordinary observation. A person is heard to threaten the life of another, and is soon after seen to go in search of him. This naturally awakens apprehension of an unfavorable result, and thus impresses the mind, and places it in the attitude of determined observation. So, the more secret but peculiar movements—by way of preparation—of a person contemplating crime, and sometimes the air and manner of such person, awaken suspicion, and induce an observer to watch their progress. So, certain peculiarities about a material object or substance, intended as an instrument of crime,—a loaded fire-arm, or the odor of inflammable substances,—may have a similar impressive effect. So, it occasionally happens that while a crime is in course of actual perpetration, something strikes the sense of a person in the immedi-



ate vicinity, with sufficient force to attract instant attention, and in these cases observations are made with great care. A sudden, peculiar and alarming sound, or a succession of such sounds, is heard in an adjoining room, followed immediately by total and continued silence. This draws attention to the spot, and leads to minute observation and vigilant endeavors to ascertain the cause. (a) Observations thus deliberately made for a particular purpose, and under a full impression of their nature and importance, constitute the most valuable and reliable materials of which circumstantial evidence can possibly be composed.

But cases of this description are of comparatively rare occurrence. A person contemplating crime generally takes care that no circumstance calculated to excite attention, before it is committed or while it is in progress, shall escape to the notice of the world about him; and his precautions to ensure secrecy are, up to a certain point, at least, too often successful. Hence it constantly happens that the first thing distinctly known respecting a crime, is the fact that it has been committed. It is true that one and another circumstance, connected with it and forming important items of evidence, may have fallen under the observation of one and another individual, before and during its perpetration; but these have occurred as *ordinary* circumstances, without any character to excite or justify more than ordinary observation. This brings us to consider, more particularly, the nature of the observations, as they are usually found to be made in these cases.

In contrast with the philosophical observations which have been adverted to, they may be described as casual, transient and superficial. They are *casual*, or incidental; the occurrences or appearances themselves literally falling under notice, or falling in the way of the senses, and not being

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(a) *The People v. Colt*, New York Oyer and Terminer, before *Kent*, Circuit Judge, January, 1842; testimony of *A. H. Wheeler*, and of *A. Seignette*.

sought out, for the purpose of observation. They are not made with a predetermined object: the mind, in the process, is passive rather than active, and receives impressions, often without a distinct idea of their cause. They are *transient*; and this, either from the nature of the circumstances themselves, or from the limited time which men occupied with their own concerns are, in most cases, willing, or, indeed, able to bestow on ordinary occurrences going on around them, especially where they do not affect themselves. They are finally, and as a natural result of the two preceding characteristics, *superficial*; or, in other words, they are made generally, and without reference to minute or latent particulars. The latter quality is most strikingly displayed in reference to the three leading circumstances of *persons*, *places* and *times*,—the essential components of all criminal transactions,—when sought to be made the subjects of accurate identification.

Thus, impressions derived from the exterior and dress of *persons* are often indistinct, especially in minor particulars; and different observers will receive different impressions from a view of the same person, at or about the very same time. *Place* is another fundamental circumstance, of which the mind is usually content to receive a general idea, especially if there are no striking visible objects at hand to give it precision. *Distance*, in its relation to place, is almost necessarily observed without exactness; for men rarely measure space accurately, without some immediate motive. (*a*) *Time* is a circumstance of the very highest importance in criminal investigation; a necessary concomitant of all other circumstances; without which, they could have no individuality, and therefore no value. Upon a question of time,—a few

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(*a*) Distances are often measured after a crime is discovered, for the purpose of giving accuracy to the statement of the observations of a witness. Trial of *Spencer Cowper*, and others; 18 Howell's State Trials, 1105, 1178. *The State v. Avery*; testimony of *P. R. Bennett*.

minutes earlier or later,—a human life has often depended. In philosophical observations, like those which have already been alluded to, time is always an indispensable element, and the observer notes and registers it to the minutest fraction possible. Such accuracy is, of course, quite out of the question in any observation of facts in ordinary life. But accuracy, even of an ordinary and attainable kind, is not always observed in these cases. As a general rule, men do not note time with precision, in connection with any occurrence they may incidentally witness, particularly where it does not concern their own affairs, even where the occurrence itself is observed with some minuteness. (a) A pistol-shot or a scream is heard by a person passing along a street or road; it excites his attention, and affects him with more or less interest, but he does not recur, on the instant, to his watch, to fix the hour and minute. Indeed, direct evidence itself, of the most positive kind, or what is so called, is liable to the same imperfection and disadvantage. A person witnesses a scuffle between two others, a few feet from him, in open day; he sees the occurrence distinctly; he sees a fatal blow struck and its immediate consequences; but he does not recur at the moment to a time-piece. The surprise and excitement which such a transaction produces in most men, are, in fact, at variance with any such coolness of observation. It does, however, sometimes happen that the time of an occurrence is accurately noted; but this is generally accidental or unintentional. The observer having already noted time for a certain purpose, the fact in question falls immediately under his observation; and the two circumstances thus

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(a) See the observations of Mr. Justice *Clayton*, in *McCann v. The State*, 13 Smedes & Marsh. 471, 495. So, persons unaccustomed to the observation of time, have often very inaccurate ideas of the length of certain periods, especially of small portions. A few seconds or minutes, when accurately measured by a watch, prove to be a much longer space of time than people in general conceive them to be. See the observations of Lord C. B. *Macdonald* in the case of *Rex v. Patch*, Gurney's Report, 171.

become, by the mere force of the coincidence, effectually associated. In other cases, time is estimated by comparison and inference. The observer recollects that, some hours before, he left a certain house, where he observed the time; and that he had walked a certain distance before reaching the spot where he witnessed the fact in question. Or, sometime after, he notes the time, and calculating backwards, arrives at his conclusion. If he has no standard of this kind, he contents himself with an approximation, and places the time somewhere between two specified hours.

Completeness and accuracy of observation may be said to depend upon the following considerations: first, the quality of the occurrence or fact observed, to attract and fix attention; secondly, the length of time during which it remains before the senses of the observer; thirdly, the situation of the observer himself, in regard to time, leisure, and opportunity of observation; and fourthly, the character of the observer, as possessing, in a greater or less degree, the faculty of observation and the disposition to exercise it. (a) Hence it is possible that a circumstance of the most commonplace and unimpressive character, may, from some peculiarity accidentally attending it, or having its seat in the observer himself, become the subject of as minute and accurate observation, as if it had actually worn a criminal or suspicious aspect. But, even under the most favorable circumstances, the accuracy attained in these cases falls greatly below that of the philosophic observer, who makes observation his special business, and, for the time, his only business, and who observes with express reference to some *future use* to be made of his observation.

What has thus far been said must, however, be understood to have exclusive application to facts or events which exist or take place, and are witnessed *before* a crime is known or believed to be committed. After that period, the character

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(a) As to observations by witnesses, see 1 Stark. Evid. 79. *Id.* 459, 460.

of observation is materially changed. It henceforth has not only a definite object, but a most attractive and absorbing one. Men now, for the first time, make observation their determined business; they observe for the very purpose of reporting their observations; of reporting them on oath, and having them taken for the truth; they go in search of circumstances, to be used as materials of evidence; the most minute inquiry is instituted into all objects and appearances of a physical kind, including the most trifling and insignificant, and, at times, the most repulsive. In short, the aid of science itself is often called in, and observations are made and registered with the strictest philosophical precision. (a)

4. Another point of contrast between philosophical inquiry into physical phenomena, and judicial investigation of crime, is in the manner in which the observations which may have been made are, at the time, disposed of. The philosopher not only observes, but *registers* his observations; registers them as they are made, and with the most careful accuracy, in the permanent form of writing. Hence the confidence with which he makes use of facts observed and recorded years before. But the observer, who is to be the future judicial witness, rarely does any such thing; especially where he is unaware, as in the case of ordinary occurrences, that what he is witnessing is, in reality, the component element or accompaniment of a crime, and that he may be called on to testify respecting it. Where a registry is, from any cause ever made by a witness, it is usually in the form of a memorandum or note, drawn up, not at the time of the observation, but afterwards, and with the help of the memory, and intended to be used in aid of it. But in the vast majority of cases, memory is the great and sole repository of observed facts, and it is upon memory alone that witnesses are constantly compelled to rely. After a crime has been dis-

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(a) See, for example, the reports of the medical examiners upon the remains and fragments of bones submitted to them in the case of *The Commonwealth v. Webster*, Bemis' Report of the trial, 62-65. And see *Id.* 78-75, 91.

covered, written registries of observed facts are not unusual, and indeed are sometimes positively required, as in cases of scientific, professional or medical examinations.

5. To return to the judicial investigator,—the juror. His facts,—the elements of the transaction which it is his sworn duty to investigate, are revived from their obscurity, and brought before him, through the medium of witnesses, reporting from memory their past observations. But here, at the very threshold of inquiry, another and very material point of difference presents itself. The philosophical investigator has always an unlimited discretion as to the subjects of his observation, and the choice of the facts which he is to take as the basis of his inferences. It is sufficient for him that the phenomena have, or have had an existence, and that they are, or have been accurately observed. These are the only conditions which limit the use he is allowed to make of them. But the juror has no such large discretion as this. It is not sufficient that a circumstance has occurred, and has been accurately observed by the witness of it; and that it has a bearing on the transaction which is to be inquired into. When the juror comes to observe it, he must do so, under supervision, and according to rule. The law assumes to judge of the quality of the fact *before* it is presented to him; to say whether it is or is not a fact *proper to be observed*, whether it has or has not a bearing that can be legally recognized. Many of the rules of judicial evidence are rules determining its *admissibility*, and excluding certain kinds of natural evidence altogether. The courts, which represent the law, constantly apply these rules in practice; and thus it often happens, in the course of a trial, that the lips of a witness are sealed by the injunction of the law itself, (speaking through the judge,) and the fact proposed to be proved by him, thereby entirely shut out from the juror's view.

6. But supposing the facts fairly placed before the juror, by evidence to which no objection on the score of admissibility

exists,—they are, in the next place, to be put together; to be considered in connection; to be used in re-constructing the case. Assuming all those testified to, to have been reported accurately, to be, in short, the actual facts as they occurred, a new difficulty may arise. Some fact is seen to be wanting; it has not been proved. And some fact may be wanting, the absence of which is not noticed. This may arise from a variety of causes. It may have been observed, but so transiently or imperfectly, as to have left no impression. It may have been duly observed, but the witness is beyond reach. And, finally, it may not have been observed by any human being; the criminal's own precaution, or the accidental concurrence of circumstances, having had the effect of excluding all observation. In cases like these, the investigation usually fails. If the desired fact be of any importance to the conclusion, it ought always to fail. The philosophic anatomist may, by the aid of scientific rules, build up, with accuracy, an entire skeleton, from a single fossil bone. (*a*) But the juror cannot supply a single fact; he cannot add one component element to the number of those which have been “retrieved” from the past; he cannot go a step beyond the evidence.

Supposing, however, the facts to be presented with all desirable completeness, and all possible accuracy, the investigation proceeds, as will be more fully shown hereafter, on the same general principle of presumption as is employed in philosophical researches; and the unknown cause or fact is developed from the known effects or concomitants, in the same general way. The analogy in this particular, has already been noticed. But in all that relates to the actual course and outward circumstances of procedure,—the time, place and mode of inquiry,—there are material points of contrast, which may be added to those already enumerated.

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(*a*) Cuvier's Fossil Remains; referred to in 1 Stark. Evid. 494, note.

7. The great characteristics of philosophical inquiry are deliberation and precision ; and, as necessary conditions of these, mental, if not physical, abstraction, and unlimited *freedom* in every sense. We have seen with what undivided attention and laborious accuracy, the investigator in physical or astronomical science collects his facts. He observes and registers with the utmost care. He rarely, especially on a subject not before examined, attempts to draw a conclusion from a single observation, or set of observations. He observes and registers again and again. Observation and deduction, indeed, may be considered, in his case, as two distinct processes, admitting of wide separation. It is not until he has observed, either singly or with the aid of associate observers, a basis of facts, numerous and authentic to the utmost desirable degree, that he sits down, at his leisure, to the business of inference : to examine his materials and apply his principles ; to analyze, compare, arrange, combine, conclude. In all this, he is under no sort of constraint. He is not necessarily confined to any particular place. He may retire into the most perfect seclusion, not admitting even the presence of his associates in inquiry ; and he often adopts this course, to secure that mental composure which such investigations generally require. He is equally at liberty, in regard to time. He may decide now, a month or a year hence, as he may choose. He constantly postpones decision until he can re-examine his facts, or confirm them by new observations. And where he does decide, he often does so *provisionally*.

But the juror, with his eleven associate inquirers after truth, finds himself under very different circumstances. The processes of collecting the facts, and deducing from them the inference desired, are, in his case, if not positively combined, (a)

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(a) According to the strict theory of judicial inquiry, the juror should postpone the formation of any definite opinion as to the effect of evidence, until *all* the evidence has been placed before him ; otherwise there is danger of acting



at least so hedged in by the common limits of a single inquiry, as not to admit of separation for any practical purpose. The juror, as we have seen, collects his facts from the reported observations of others; and the facts, thus indirectly obtained, are themselves presented and disposed of, in a manner most strikingly in contrast with that which has just been described. Though reported long after the time of observation, they have, in most cases, never been registered, except in the tablets of memory. And even as they come from the mouth of the witness, the juror is not allowed to register them for himself. They are to be immediately transferred from the memory of the witness to his own, without any visible record. (a) Thus, the faculty of memory is made the sole repository of a mass of facts which it has taken days and weeks to collect in evidence.

But this is not all. From the moment the juror enters upon the business,—with him, the duty—of inquiry, to the

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under the influence of imperfect, premature, or false impressions. An impression, once made by a prominent fact, is not always easily removed, even by new facts entirely adequate for the purpose. In practice, however, it is hardly doubtful that the process of making up an opinion upon evidence, is generally a gradual one, beginning with the first fact proved, and growing into shape and distinctness as the proof goes on. Indeed, it is, in itself, almost impossible to admit a fact into the mind, as a mere item of evidence, and yet to exclude the impression which naturally accompanies it. And the entire dependence of the juror on his memory, seems inconsistent with any effectual separation of the processes of hearing and determining, above alluded to. The theory of the procedure is, that the juror, having heard all the evidence, retires with his associates, “to consider” of his verdict. But in many (not to say most) cases, the opinion of each individual juror is essentially made up before he retires; the chief object of that formality being to give opportunity for the interchange of opinions, and to harmonize and mould them into one common expression.

(a) Jurors are not allowed even to take notes of the testimony, except by express permission of the court, which is very rarely granted. In the case of *The State v. Avery*, tried before the Supreme Court of Rhode Island, May, 1833,—a trial of unprecedented length, commencing May 16th, and continuing to June 2d, and in which upwards of one hundred and fifty witnesses were examined,—such permission was applied for, but refused.

moment after his verdict is pronounced, he acts under the almost constant pressure of immediate personal constraint. From the moment he enters the court-room, in obedience to the summons of the law, until discharged, he places himself under judicial control. He renounces, *pro hac vice*, his personal freedom. He cannot leave the place but by express permission, which the court has always a discretion to withhold, and where he is permitted to leave, as for the day, it is under strict injunction as to his conduct in the interval. Always, while in the presence of the court, and often when out of it, he is under the immediate guard of the officers of justice. He may, in short, be considered as being, during the whole period of the trial, in the custody of the law.

More than this,—he must observe, inquire, examine, infer, all but decide, *in public*; subject to all the exciting and exhausting influences which confinement in the immediate presence and close contact of crowded assemblages, so naturally exerts upon the human frame; and this he must do day after day, and sometimes for weeks together. It is true, he retires, with his associates, at the close of the trial, to the comparative seclusion of the jury-room, to consider of his verdict. But there he is under greater constraint than before. He cannot withdraw to his own apartment, for private reflection on the momentous decision he may be about to make. He must, if he have not done it before, (*a*) carry on the processes of recalling the facts proved; passing them through his mind, in a certain order and combination; and extracting a satisfactory conclusion, in the constant presence and close proximity of all his associates.

Finally, the juror is limited and constrained in the important particular of *time*. A trial, once entered upon, cannot be, for any considerable period, postponed. The process of collecting the facts once closed, those of examination and decision must immediately follow. There can be no delay

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(*a*) See *ante*, p. 107, note (*a*).

until new light be obtained from further observations. The limits which have, all along, confined the juror's action, are now fast narrowing to a point; and though the active duties of his office may be said to be only beginning, (for he has hitherto been chiefly a passive observer of the case,) he is expected to discharge them all within the compass of a few hours. The effect, and, indeed, the avowed object of the personal constraint to which he is now more stringently subjected than ever, is to *hasten* and *enforce* decision. He cannot escape from what is visibly a state of imprisonment, he cannot return to his family and his necessary avocations, until he has made up his verdict and agreed with his fellows. And, what is the most important circumstance of all, he must decide, not only at once, but *absolutely*. Though the life of a human being may depend on the result, he cannot decide with any reservation. The law waits to act upon his verdict, and expects and demands it to be rendered in a final and unconditional form, or not at all.

The foregoing comprise the principal points of view in which a course of philosophical inquiry, and the process of a criminal trial by jury, as means of discovering a desired truth, in the way of presumptive inference from other known truths, may be made subjects of comparison; and they would appear to present a decided preponderance of advantages, in point of correctness of conclusion, on the side of the former. But there are points of view, in which most of these circumstances of seeming disadvantage will be found either to have a positively favorable effect upon the result of the trial, or to be balanced by advantages peculiar to the subject.

Thus, in the first place, a trial being a *public* investigation regulated by law, is placed, at the outset, upon a basis entirely different from that occupied by philosophical investigation of any kind. But even this material circumstance of difference is instrumental in working out the same great

end : publicity being relied on for the very same purpose in the one case, that privacy is in the other,—the more effectual development of *truth*.

Secondly. The subject matter of a criminal trial is human conduct, mixed up, as it comes to be examined, with a variety of merely physical circumstances, but originating wholly in the *moral* nature, developed into action by moral influences, and to be judged of by considerations of a moral kind. The inquiry itself is practical throughout, and in no sense speculative ; not demanding, for the attainment of its object, any extraordinary acuteness of bodily sense, or any exclusive exercise of intellectual power ; and therefore not calling for that physical and mental *abstraction*, which studies involving those conditions, in their nature require.

Thirdly. As to any seeming imperfection in the *mode* of *collecting* the necessary *facts*,—namely, from the orally reported observations of witnesses,—and in the manner in which the observations themselves are originally made, it is to be observed, that the same minute accuracy in the perception of each individual circumstance, as it is not, in the nature of things, to be expected, is not actually required: the jury constantly relying upon one circumstance to aid another, and being always governed, in the end, by the effect of *all* the circumstances *taken together*.

Fourthly. The disadvantages which would appear to grow out of the circumstances and concomitants of a public trial, considered in a physical point of view,—the confinement of the *person* in close contact with crowded assemblages, and the continued exposure to impressions which would tend to embarrass, if not to frustrate any purely intellectual inquiry,—are, for the most part, overbalanced by the effect of the principle upon which juries themselves are selected and composed. They are made up, not of men professionally accustomed to philosophic processes, and in the daily habit of observing and thinking with philosophic pre-

cision; not of men with whom physical privacy is almost a necessary condition of mental action, and who are often constitutionally susceptible of disturbance from external causes; but of men taken from the mass of the people, accustomed to meet and mingle in promiscuous assemblages, and, though sufficiently qualified in point of intelligence, yet largely governed by their moral sympathies:—of men strongly actuated by natural curiosity to hear the details of occurrences which have agitated a whole community; and whose personal interest, therefore, in the subject of inquiry, even unaided by the consciousness of a sworn public duty, is powerful enough to overcome and neutralize the effect of what might, with others, operate as disturbing causes. Indeed, the circumstances before alluded to, and which would appear so unfavorable to accurate inquiry and reflection, in other points of view, seem to have a positively favorable effect, in concentrating the juror's attention upon his subject, and in impressing upon his mind the facts upon which he is to decide.

Fifthly. The peculiar physical *constraint* under which the juror is obliged to investigate, is practically found to be rather an aid than an impediment to the proper discharge of his duty. It has, indeed, an effect quite analogous to that of *seclusion* in the study of speculative subjects. The policy of the law, (which, in this respect, obviously coincides with the requirements of reason and justice,) demands that the juror, while engaged in the important business confided to him, shall be kept, as far as possible, from the influence of any external circumstances which might divide, or even divert his attention, or serve to give a direction to his verdict. He is to inquire of nothing but the single case before him, and he is to know nothing of that, but through the single channel of the evidence. And, in order to accomplish these desirable ends, the law adopts the very effectual means of separating his person, for the time, from the mass of his

fellows, and of taking him, in short, into its own peculiar keeping. Thus, although the juror observes and investigates in public, he does so under circumstances of isolation almost as complete as any to which the philosophical inquirer ever subjects himself.

Lastly. The circumstance of limitation, in point of *time*, though apparently calculated to interfere seriously with that deliberation which should always distinguish judicial inquiry, arises *necessarily* out of the nature of the inquiry itself, as a practical duty affecting the interests, comfort and convenience of numbers. Trial, although the ordinary and proper business of courts, is only the occasional and temporary business of those who assume the characters of jurors and witnesses. To them, it is emphatically an interruption of business,—of the daily and often necessary pursuits of life ; always interfering with their convenience, and sometimes seriously abridging their personal freedom. It is a great public duty, overbearing for the time all other human duties, except those of the most sacred kind. Hence it is desirable that these irksome and afflictive restraints should be made as *short* in their duration as possible. Indeed, so far as jurors are concerned, the powers of human endurance themselves necessarily fix a limit to the length of inquiry. Exhaustion beyond a certain point would unfit them for duty, and thus defeat or endanger the whole object of the trial. And this is a state of things utterly without remedy. The philosophic inquirer, when wearied by labor, may refresh himself by a long and indefinite interval of rest. His facts are registered and placed beyond the risk of loss, and even if they were not, decision is, with him, a purely voluntary matter. But in a criminal trial, two considerations imperatively forbid any such disposition of time. The facts are registered nowhere but in the juror's memory, and any considerable interval of interruption would endanger their accurate preservation, and thus lead to disastrous results. And finally,

the condition of the accused himself,—a prisoner, under treatment as a felon, with his dearest rights put in imminent jeopardy,—demands uninterrupted inquiry, and the speediest possible decision, consistent with the attainment of truth.

Thus, on the whole, it is seen that the process of judicial inquiry after truth, especially by means of circumstantial evidence of the *presumptive* class, when compared with philosophical researches of a certain kind, presents, with striking points of analogy, equally striking points of contrast. It is seen, also, that the disadvantages which appear to exist on the side of the former, are compensated, in a material degree, and so far as the subject itself allows, by the positive provisions of the law. To a superficial observer, there would appear to be little of philosophy in the aspect and arrangements of an ordinary criminal trial:—twelve plain men, applying their common sense, in the natural interpretation of familiar facts, with the view of drawing a single proposed conclusion. But profound wisdom often lies concealed under the most unpretending exterior. It has been already sufficiently shown, that these plain men cannot effectually discharge the apparently simple duty confided to them, without (however unconsciously or inartificially,) applying principles, and performing processes, which lie at the foundation of all philosophical knowledge. And so it is with the external arrangements of the trial, considered in relation to their effects. And thus it will be found that the law, in adapting the only practicable mode of inquiry to the important end it contemplates, and in converting apparently unfavorable circumstances into positive aids to investigation, has acted in the spirit of the soundest philosophy.

The great object of judicial inquiry into crime, in common with research in any branch of knowledge, we have seen to be, the discovery of *truth*: and this object is equally attained by the conviction of the guilty, and the acquittal of the innocent. But the truth, thus arrived at, is, as we have further

seen, not absolute but *contingent*; that is, it is liable to certain *possibilities of error*, arising either in the process of acquiring the necessary facts, or in that of deducing a conclusion from them. In this too, it has a quality in common with the truth attained even in philosophy,—a quality from which it can never be wholly freed. But the results arrived at in criminal trials, and embodied in the shape of criminal verdicts, are distinguished from all other human conclusions by their immensely practical character and consequences. Their effect is, not to settle abstract principles, nor to aid in establishing general laws, but to dispose of *human rights*, and that, often, irretrievably. Hence there is actual *danger* attending error in these cases, which gives to the possibilities above described, great prominence and importance:—the danger of reversing the true results of inquiry, of acquitting the guilty and convicting the innocent. The latter of these contingencies involves consequences so repulsive and intolerable to humanity, no less than to justice, as to give it an immense preponderance over the former; so that, in any case, the danger (in any serious sense of the term,) may be said always to lie on the side of conviction. This, indeed, is the view of the law itself, and hence the precautions it has taken to prevent its occurrence. It provides that conviction shall always be made to turn, not on any niceties of observation or deduction respecting particular facts, nor on any elaborate balancings of conflicting probabilities; but upon broad, practical, convincing views of the case, derived from the whole body of facts proved, taken together. It does not allow the contemplation of error, as a merely *possible* result, to interfere with the progress of investigation, nor to shake the firmness of the juror in the discharge of his office; neither does it exclude possibilities entirely from his view. But, having provided that the desired conclusion shall, in the first instance, be made up on considerations of reasonable probability, it admits, and indeed requires, that



possibilities shall be taken into account, and actually applied as final tests of its correctness. Above all, it provides a most desirable relief for humane and conscientious minds, intent on the discharge of a great public duty, but oppressed by perplexities which cannot be readily escaped, by demanding that, in cases of reasonable doubt, no verdict shall be rendered but a verdict of acquittal.

In treating of circumstantial evidence, as a means of judicial inquiry, any method aiming at comprehensiveness would seem to require the consideration, first, of the *materials* of which such evidence is composed; and, secondly, of the *principles* which regulate its application. This twofold division will therefore be prominently maintained in the present work; and, in regard to both its branches, the subject will be considered with an exclusive reference to *criminal* jurisprudence.

It is in the character of a means of detecting and punishing *crime*, that circumstantial evidence comes to assume its greatest importance; and it is in the same character that it has been made the subject of much ingenious speculation and earnest argument. The reasoning upon which it has been condemned as a basis of decisions affecting human *life*, has already been adverted to, (a) and will receive additional notice hereafter. (b) But this reasoning, it may be here observed, has been forcibly met by a single consideration of the most practical and impressive kind, to wit, its actual *necessity* to the proper administration of criminal justice. Secrecy,—intentional withdrawal from human observation, with the view and the constant effect of cutting off the sources of direct evidence,—has already been shown to be a characteristic of criminal action in all its stages; (c) and the inducement to this secrecy is generally found to increase

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(a) See *ante*, p. 70.

(b) See Chapter V.

(c) See *ante*, p. 68.

with the enormity of the crime, and the severity of the punishment apprehended as its consequence. (a) Hence the necessary resort to indirect evidence, the only description of evidence left within human reach. The subject has been placed in a clear light, by the observations of the judges of the King's Bench, in the important case of *Rex v. Burdett*. (b) "If no fact," said the Chief Justice in that case, "could be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is, or can be given; the man who is charged with theft is rarely seen to break the house, or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup." (c) The language of Mr. Justice *Best*, on the same occasion, was still more emphatic. "Until it pleases Providence," said that learned judge, "to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished." (d) Opinions to the same effect, have been expressed by American judges, in several important cases. (e) The necessity of employing evidence of this kind, as an instrument of conviction, is,

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(a) "Visible proofs," said Mr. Justice *Buller*, in the case of *Rex v. Donellan*, (Warwick Spring Assizes, 1761,) "must not be expected in works of darkness." The very name given by the old common law to one of the highest crimes in its catalogue, implied concealment, (*murdram*.) And the earliest writer on English crown law has graphically described the same offence by the same characteristics:—*homicidium, quod nullo præsente, nullo sciente, nullo audiente, nullo vidente, clam perpetratur*. Bract. lib. 3, c. 15, ¶ 1, fol. 184 b.

(b) 4 B. & Ald. 95.

(c) *Abbott*, C. J. (Lord *Tenterden*,) in *Rex v. Burdett*, 4 B. & Ald. 161.

(d) *Best*, J. in *Rex v. Burdett*, *Id.* 123.

(e) *Story*, J. in *United States v. Gibert*, 2 Sumner, 19, 27, 28. *Livingston*, J. in *United States v. Jacobson*, 2 City Hall Recorder, 148, 149, 152. *Washington*, J. in *United States v. Johns*, 1 Washington, C. C. 372. *Shaw*,

indeed, agreed on by all modern writers of authority who have treated of it; (a) even by those who have confined its application within the narrowest bounds. (b) And, in fine, the same necessity is most forcibly exemplified by the actual practice of the courts, which constantly allow convictions to take place by the sole aid of the light which such evidence affords. (c)

The subject of the present chapter may be most conveniently considered under the following heads: first, the *object* of inquiry, or principal fact sought; secondly, the facts constituting the *materials* of the evidence, and intended as a basis of inference; thirdly, the *process* of inference or presumption from such facts, and by means of which the principal fact is reached; and fourthly, the character of the inference, *conclusion* or verdict itself.

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## SECTION I.

### *The object of inquiry, or principal fact sought.*

The object of inquiry, in all criminal cases, is simply to determine which of the two suppositions, involved in the issue of "guilty or not guilty," submitted to the jury, is, in fact, the truth. The object, indeed, primarily is to establish the affirmative supposition of *guilt*: innocence being left to be

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C. J. in *Commonwealth v. Webster*, Bemis' Report, 462. Gibson, C. J. in *Commonwealth v. Harman*, 6 Am. Law Journal, 123. Clayton, J. in *McCann v. The State*, 13 Smedes & Marshall, 471, 489.

(a) 1 Stark. Evid. 23, 479. 1 Phill. Evid. 437. Wills, Circ. Evid. 247. Best on Pres. § 189. 1 East's P. C. c. 5, § 11. 2 Russell on Crimes, 727.

(b) Theory of Presumptive Proof, p. 56.

(c) "I apprehend," said Mr. Justice Bayley, in *Rex v. Burdett*, "that

made out, either as a consequence of failure in the attempt to convict, or in the way of defence distinctly set up and adequately proved. The jury, it is true, always enter on the inquiry under the presumption, which the law itself imposes, that the accused is innocent; and they are governed by the same presumption throughout, until it is fairly overcome by the force of the evidence submitted. But the proposition actually presented to the court, the fact offered to be proved in the first instance, and with express view to which, the accused is arraigned for trial, is that he is guilty. This is otherwise termed "the fact sought," "the fact to be proved," (*factum probandum*,) or "the principal fact," (*a*) as distinguished from the facts presented in evidence; sometimes as "the hypothesis of guilt or delinquency," or "the affirmative hypothesis;" and sometimes simply, and by way of eminence, as "the hypothesis of the case."

This principal fact is, in all cases, composed of two others; first, the fact that *a crime* has been committed; and, secondly, the fact that *the accused* has been instrumental in its commission. The former of these, technically known as "the *corpus delicti*," (*b*) always constitutes the foundation of the latter; and both must be proved, otherwise no con-

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more than one half of the persons convicted of crimes, are convicted on presumptive evidence." 4 B. & Ald. 95, 149.

The position that it is lawful to convict on circumstances only, observes the Scotch writer *Hume*, "is not only vouched by the whole series of our criminal records, but also is grounded in reason and necessity, and the law and practice of all other civilized realms." *Hume's Comm. Trial for Crimes*, vol. 2, c. 15, p. 287. In cases of prosecutions for divorce or damages, on the ground of criminal conversation, courts and juries are constantly compelled to act upon presumption; direct proof being in its nature unattainable. See *Loveden v. Loveden*, 2 Haggard's Cons. Rep. 1. *Cadogan v. Cadogan*, *Id.* 4, note. 8 Phill. Evid. (Cowen & Hill's notes,) Note 285.

(*a*) 3 Benth. Jud. Evid. 8.

(*b*) The term *corpus delicti* is taken from the civil law, and is usually explained to mean, "the substantial general fact of a crime having been committed." According to its literal signification, it is *the body* or substance of *the crime*, as distinguished from the particular form given to it by its connec-

viction can take place. (a) Until a *corpus delicti* be established, there is, in fact, no proper subject before the jury. The act complained of, may have no quality of legal guilt whatever. It may have been exclusively the act of the party who is the subject of it, or it may have been the result of natural causes, or pure accident. The article charged to have been stolen, may have been either lost or mislaid ; the person alleged to have been murdered, may have either died by his own hand, or from the effect of sudden illness, or casualty ; in either of which cases, judicial procedure against another person, as the criminal cause of the disappearance or death, would be manifestly out of place. But when the character of a *crime* has been satisfactorily given to a transaction or occurrence, a foundation is effectually laid for the next great step in the process of inquiry,—the tracing out of its *author*.

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## SECTION II.

*The facts proved, constituting the materials of the evidence, and basis of inference or presumption.*

The object of the trial, or principal fact sought, being to be reached by the process of inference or presumption, the first thing to be considered is the *basis* of such presumption. “ There can be no presumption, in the nature of evidence,

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tion with the accused. Sometimes it has been translated “ the subject of the crime,” or its visible effect ; such as a body killed or house burned, or their remains : *corpus* being used in its ordinary sense of a material substance. See the argument on the Trial of Captain *Green* and his crew, 14 Howell’s State Trials, 1229, 1280.

(a) See Julius Clarus, *Sententiarum*, lib. 5, qu. 4.

in any case," said Lord *Mansfield* in the case of *Goodtitle* dem. *Brydges v. Duke of Chandos*, (a) "without something from whence to make it, some ground to found the presumption upon." This foundation always consists of the *facts proved* in the case, and constituting the materials of the evidence.

These facts are sometimes termed, from their relation and subordination to the principal fact, *minor facts*; (b) and from their office or effect, *evidentiary* or probative facts. (c) They are, in other words, the *circumstances* from which the evidence they compose derives its most familiar name. (d) They are, as has already been observed, the constituent parts or elements of a past transaction, into which it is proposed to inquire, and which it is the first object of inquiry to revive, in order to consider. Hence, the greater the number that are truly presented, the greater the probability that the case made out by combining them, will

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(a) 2 Burr. 1065.

(b) Wills, Circ. Evid. 27.

(c) See *ante*, p. 8. And see 1 Benth. Jud. Evid. 18, note.

(d) Pains have sometimes been taken to distinguish between a *fact* and a *circumstance*; the latter being defined to be "a minor fact." Theory of Pres. Proof, p. 29. Wills, Circ. Evid. 27. As expressive of the materials of evidence, the terms seem to be entirely convertible. Hence they are constantly used in connection, as in the expressions, "facts and circumstances," and "facts or circumstances." As applied, however, to the ultimate end of inquiry, "fact" is the exclusively proper term. The term "circumstance" always implies *relation*, which "fact" does not: a circumstance is a relative fact. "Any fact," observes Mr. *Bentham*, "may be a circumstance with reference to any other fact." 1 Jud. Evid. 42, note. See *Id.* 142. Taking the radical import of the word, circumstances are facts standing around, surrounding or accompanying another fact, (see *ante*, p. 8,) and giving to it a certain determinate character or quality. Hence, they are very expressively termed, in Scotch law, "qualifications." See 11 Howell's State Trials, 1388. 14 *Id.* 1287, 1245, 1246, *et passim*. But the most significant term is that of the Roman law,—*indicia*, which expresses their office of indicating or *pointing* to the fact sought. Cod. 8, 32, 19. *Id.* 4, 19, 25. This has been translated "indications," and in Scotch law, "tokens;" and has been retained in French law, in the word *indice*. Best on Pres. § 11, note (f).

be identical with the case as it actually occurred. (a) Occasionally, they are few in number, and even two or three circumstances have sometimes been held to be a sufficient basis for an inference of guilt. But circumstantial evidence is more commonly found to consist of a *variety* of facts, capable of presenting every variety of modification and combination: often running into great minuteness of detail—a quality which the term “circumstantial,” itself, is, even in ordinary language, constantly used to express. When arranged in a certain order, and combined by means of proper connections, they are frequently said to constitute a *chain* of evidence. (b)

Crime, as it is regarded and punished by law, is an outward act, directly affecting the rights of another. A crime, in the strictest sense, is a single, voluntary, injurious act against law, committed under certain circumstances of time place and manner. But considered with reference to its intrinsic character, and as a subject of investigation, the term “crime” presents a much more complex idea. The criminal act, which alone the law regards and punishes, is but one of a series of mental and outward acts, constituting a *course of conduct*; beginning at an antecedent point, sometimes quite remote, when the idea of crime is first presented

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(a) 1 Stark. Evid. 503.

(b) The common figurative term “chain” very aptly and adequately expresses the following ideas, which are inseparable from any correct idea of circumstantial evidence; first, *connection* or union of separate elements or links composing one body; secondly, *series*,—one fact succeeding another, (as in a line of links,) in a certain order; thirdly, *dependence*,—one fact resting or depending upon another, as a result of the preceding. This quality of dependence, it should be observed, is not to be confounded with another species of dependence, which will be hereafter explained, arising out of the mode of proof; and which is regarded as an imperfection in a body of evidence.

What is called a *chain* of circumstances, is very often found to be composed of a variety of minor or subordinate chains, each connecting the accused with some leading evidentiary fact. More will be said on these subjects under a future head.

to the mind, or the first criminal inclination is entertained ; and ending with the last act of the criminal which can be made the subject of evidence. All these acts are connected together by the order of their succession, by their immediate relations to each other, and by their common and constant reference, direct or indirect, to the principal act, or crime itself. And as the object of the criminal agent is usually threefold,—to prepare for the crime, to commit it, and to escape from its legal consequences, the acts themselves may be conveniently classed under a corresponding threefold division of precedent, concomitant and subsequent circumstances. (*a*)

It may serve to illustrate the course which criminal action, in this more extended view of it, is usually found to take, if we consider these acts in somewhat of detail, observing their historical order, as they may be supposed to have existed in a given case ; abundant examples and proofs of every one of them being furnished by the most authoritative records of actual trials. Let it then be supposed that an adequate motive has been awakened in the mind of an individual, to commit the crime of deliberate murder ; and that, under its influence, a settled purpose has been formed to take the life of another, either for the gratification of revenge, or with the view of gain. The first direct act towards the accomplishment of this purpose, and the foundation, indeed, of all subsequent action, is the ascertainment of the possibility and means of committing the crime. This settled, the criminal's plan is next arranged. (*b*) The requisite instrument of

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(*a*) A prominent use will be made of this division in the next part of this work. See Part II. Chap. I. Sect. III. XIII. XVI.

(*b*) The example here given is that of a crime deliberately planned, upon a settled purpose, and in which the action of the criminal goes on slowly, step by step, from its commencement to its consummation. In many cases, however, the action is much more rapid, sometimes actually precipitate ; the existence of a criminal motive and inclination being immediately followed by the formation of a corresponding purpose, and that, again, instantly carried into execu



destruction is next sought for, selected or fashioned, prepared and secreted for use. The preparations being complete, the criminal either awaits his opportunity, or creates it by his own act. The victim being within reach, the felonious assault is finally made, and the crime itself actually perpetrated. This done, the whole object of subsequent action is to avoid the effect of that which has preceded,—to escape the consequences which are now known to be impending. If time and means be allowed, the murderer proceeds to destroy the subject of the crime itself; he removes the body of the victim from the scene, buries it in some lonely spot, sinks it in some stream, or disposes of it by more elaborate and revolting methods of concealment or destruction. He carefully obliterates from neighboring objects, as well as from his own dress and person, the bloody witness of the transaction. He hides or destroys the instrument of violence, or removes from it the traces of its use. Sometimes he forges facts, with a view to change the outward appearance of the act, by giving it the semblance of suicide or casualty; or, leaving that untouched, to attract suspicion towards some other person, and by that means to divert it from himself. Sometimes, he invokes the aid of another crime, and arson is employed to involve in one common destruction, the scene, the subject, and the evidence of the murder. Lastly, if no time be allowed for action of this kind, or if he be disturbed before he has completed it, he flies precipitately, and hides himself from view.

Of this whole course of criminal conduct, the usual accompaniment and characteristic is *secrecy*: a quality sometimes furnished by favoring circumstances, sometimes intentionally and laboriously impressed upon the transaction, but always relied on by the offender, as a means of preventing, or, at least, of baffling or retarding the pursuit of justice.

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tion; as where an opportunity presents itself the moment the criminal impulse is felt, and the instrument of violence is at hand.

Thus, as long as he keeps his motive and purpose within his own breast, he knows they cannot be directly penetrated by any human power, and he is careful to abstain from any outward intimation that might reveal, even to a casual observer, the existence of these moving springs of crime. His plan is arranged with equal regard to the same object. The instrument of violence, if of a description in the least calculated to awaken suspicion, is stealthily procured, and industriously kept out of view. But it is around the *actual perpetration* of the crime, that the veil is thrown with peculiar and redoubled care. He sets out on its commission under the cover of darkness, or with person muffled and disguised; he finds his victim alone, or buried in sleep, or watches for him at some solitary place; and there, with no human eye to witness, suddenly dispatches him. From this moment, the motive to secrecy acquires additional force. What before was a means to a desired end, is now an absolute necessity of existence. The murderer feels himself to be such, and knows that the ministers of justice will soon be on his track. Some of his precautions to baffle or elude them, have just been enumerated. Henceforth, in short, the whole object of his life is *concealment*, either of his crime, or of his own person. To attain this, he will make any sacrifice. To hide the body of the slain, he will, though utterly unused to manual labor, toil for hours at the most revolting drudgery, denying himself rest and food. To conceal himself, he will undergo almost any amount of personal suffering. Supposing, however, this great object to be frustrated, and that he falls at last into the hands of his pursuers,—even in the actual grasp of the law, he does not lose sight of his determined policy. He assumes the air, the demeanor, and the language of innocence; resolutely and perseveringly repels the charge of guilt; or wraps himself up in impenetrable silence.

But these precautions, though ever so elaborately con-

trived, and ever so diligently adhered to, are not always,—we might rather say, are rarely,—entirely successful ; simply because the subjects of them cannot, in their nature, be brought wholly under human control, or moulded to accord with human purposes. It is in the nature of acts like those which have just been mentioned, in common with facts in general, that they are surrounded on all sides by those incidents and accompaniments known as *circumstances* ; the connections with which, (more or less obvious in themselves) sometimes run to great extent, involving a variety of minute particulars, wholly beyond human power or foresight to prevent, suppress or destroy. Along the whole course of criminal action, such as it has been described, these faithful *indicia* of human agency are found, pointing immediately to the subordinate acts with which they have been directly connected, and all often bearing, without exception, though from different points and distances, in one common direction, towards the principal or central act,—the crime itself. (a)

The character and office of these indicatory circumstances may be most aptly illustrated, by taking them in their historical order, which is the order of their actual existence and occurrence. The *motive* of revenge or gain could not, in itself, and as a mere mental impulse, be known or directly reached, even by the most strenuous efforts for the purpose. But it had its origin in certain *relations* between the parties, which relations are perfectly known to others ; and through the medium of these circumstances, the motive stands revealed, sometimes with all the clearness of confession.

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(a) "Happy is it for the interests of society," observes Mr. *Starkie*, "that forcible injuries can seldom be perpetrated, without leaving many and plain vestiges by which the guilty agent may be traced and detected. Instances of this nature, where apparently slight and unexpected circumstances have led to the detection of offenders, are familiar to all who are concerned in the practical administration of justice." 1 *Stark Evid.* 485. And see the observations of *Shaw*, C. J. in *Commonwealth v. Webster*, *Bemis' Report*, 462 468.

Again, the unlawful *purpose* may have been, in general, successfully concealed. But in an unguarded moment, or under the pressure of intense desire or hate, an expression or a word is dropped in another's hearing, disclosing effectually the feeling which prompted it. So, notwithstanding the care with which the intended *instrument* of destruction may have been procured,—perhaps from a distance, and by a circuitous course,—it is only in cases where it has been stolen or fabricated by the criminal alone, that it is procured without the agency or aid of *others*, in no way parties to the transaction. The gunsmith who sold the pistol, and the apothecary of whom the poison was purchased, always furnish the means of tracing the instrument to the hand that used it.

It is to the concealment of the *crime itself*, as before observed, that the most strenuous efforts of the criminal are addressed; and these efforts are often successful. Traces of guilt may be distinctly visible, before and after; but the important space occupied by the crime itself, and where these traces would otherwise be found to unite, presents to the view a perfect blank. But in other and numerous cases, though the acts themselves, which immediately compose the crime, may be effectually hidden in darkness by their author, no means of precaution avail to prevent or suppress the circumstances which attend them. Indeed, as has been well observed, “the very measures which he adopts for his security, not unfrequently turn out to be the most cogent arguments of guilt.” (a) Though he may have set out for the scene of crime, under the cover of midnight, his departure is observed. He is seen on his way, and his direction is noticed. His disguise fails to conceal some striking personal peculiarity, by which he is identified. The darkness itself is lighted up by a transient flash, revealing his form or features. Supposing him arrived at the scene of crime, another sense,

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(a) 1 Stark. Evid. 480.

more subtle and far-reaching than sight, is aroused against him. The noise of his forcible entry, the cry of alarm, the report of the murderous weapon, the scream of mortal agony, penetrate the distant ear, proclaiming the commission of a crime. In the hurry of escape, the instrument of death is dropped; some article of clothing is left behind; the bloody hands leave traces on every thing they touch. Snow has fallen, or the ground has been softened by rain; and on its surface, the criminal's footsteps are faithfully impressed, betraying his presence, indicating the direction of his movements, and often affording the first material clue to his arrest.

The crime is discovered, and the perpetrator sought, and now additional circumstances accumulate. Finding himself suspected, or actually pursued, he flies. Overtaken, the emotions he feels, refuse to be disguised or suppressed, and exhibit themselves openly in his countenance and demeanour. His person is examined, and found stained with blood; or, if he has succeeded in removing this, similar stains are discovered on his dress; some, possibly, accompanied by visible marks of attempts to erase or wash them out. His dwelling is searched, and, in some obscure nook, is found hidden an article of clothing bearing plainer tokens of the recent slaughter, or stained with soil peculiar to the scene of crime. A pistol is found concealed, and with marks of having been lately discharged. The bullet taken from the mortal wound, is applied to the barrel, and ascertained to fit it accurately. A fragment of paper, taken from the prisoner's pocket, is observed to correspond with another composing the wadding of the charge; and, on being brought together, the torn edges of the one, are found to fit those of the other with the minutest accuracy. Lastly, the fruits of the crime, themselves, are discovered; the watch, plate or jewels, known to have belonged to the deceased, are found in the prisoner's possession.

It is by circumstances like these, that light is shed along

a whole course of criminal conduct; indicating its object and direction, revealing the principal acts of which it is composed, through the obscurity ineffectually thrown around them; and pointing out the perpetrator himself, by connections and indications as conclusive as though the facts had been directly proved by actual eye-witnesses. It is of such as these, presented in every variety of modification and combination, according to the crime, the parties, and the nature of the case, that *circumstantial evidence*, in the broadest sense of the term, is found to be composed.

These elementary facts or circumstances will now be considered, under the several heads of their sources, divisions, varieties, and medium of proof.

The general *sources* of facts or circumstances, which may be used as materials of evidence, are found in the constitution and conduct of man, including his relations to his fellow-men, and to the external world; in the course of external nature; and in external or material objects and appearances, as they become the subjects, instruments or auxiliaries of human action.

The facts themselves have been classed under various *divisions*, usually of a twofold character.

The first division of facts has reference to their source and seat. "Considered in respect of its source," observes Mr. *Bentham*, "all evidence flows either from persons or from things; all evidentiary facts, as well as all principal facts, are afforded either by *persons* or *things*." (a) This division seems to be expressed with sufficient accuracy, for practical purposes, by the terms "physical" and "moral"; (b) the former having their source and seat in inani-

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(a) 8 Jud. Evid. 11, note.

(b) "Real" and "personal" would be more literally expressive, were it not for the equivocal sense of the former word. And these are the terms actually adopted by Mr. *Bentham*, in his division of evidence. See *infra*. The terms "mechanical" and "moral" are used by Mr. *Wills*. Circ. Evid. 85, 86

mate objects; the latter in moral persons. The common ultimate source of all facts, (considered as materials of judicial evidence,) is, doubtless, human will and agency, operating by means or with the aid of external objects and phenomena, or subject to their influences. A fall of snow, the light of the moon, or of a street lamp,—often very important circumstances in the proof of a crime,—are of course, in their origin and nature, wholly independent of the conduct of the criminal; but their *connection*, as circumstances of the case, arises entirely from it.

This division of *physical* and *moral*, as founded on the corresponding division of things and persons, is manifestly not philosophically precise, as it leaves certain properties of both descriptions of facts, in common. *Persons*, being composed of matter, as well as spirit, are, in an important point of view, physical objects; and, in that respect, belong to the class of *things*. (a) The requisite accuracy of division has been attempted to be reached by the employment of the terms “physical” and “psychological,” which is the division adopted by two writers of eminence. (b) A *physical* fact is defined to be “a fact considered to have its seat in some inanimate being; or, if in an animate being, by virtue, not of the qualities by which it is constituted animate, but of those which it has in common with the class of inanimate beings.” (c) A *psychological* fact is “a fact considered to have its seat in some animate being; and that by virtue of the qualities by which it is constituted animate.” (d) Physical facts are, in other words, objects of sense; such as the sound of a pistol-shot; a man running; impressions of human feet on the ground. Psychological facts are those

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(a) 3 Benth. Jud. Evid. 11, note.

(b) 1 Benth. Jud. Evid. 45—47. Best on Pres. § 18.

(c) 1 Benth. Jud. Evid. 45.

(d) *Ic.* 45, 46.

which can only be perceived mentally; such as the *motive* by which a person is actuated. (*a*)

Another important division of facts, as materials of evidence, having reference to their origin and effect, is into *genuine* and *fabricated*; the latter being also sometimes termed *simulated* and fraudulent. A genuine fact is one which, when accurately observed, conveys a true impression as to its cause, or in other words, indicates truly, on its face, the person of whose action it has formed a part, or accompaniment, or out of whose action it has originated. A fabricated-fact is one which conveys, and is intended to convey a false impression as to its cause, or indicates a wrong person as its origin. The possession of stolen property by the real thief, is a genuine fact; the possession of stolen property by an innocent individual, to whose person or premises it has been conveyed by the thief himself, is a fabricated or simulated fact.

Fabrication of facts, or of the evidence of facts, is the giving an outward appearance to things, which leads to a wrong conclusion. (*b*) This deceit is, in a few rare instances, the pure work of nature or accident; but, in the vast majority of cases, it is the work of human artifice. (*c*) In these, it is very significantly expressed by the term commonly applied to it,—*forgery*. (*d*)

Forgery of facts, as the materials of evidence, is usually the act of the real criminal; its object being to conceal or destroy the effect of genuine facts which, otherwise, would serve to betray him. Occasionally, it is resorted to by innocent persons, under the influence of a natural anxiety to

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(*a*) See Best on Pres § 18. Physical facts are classed by Mr. Bentham, under the head of “*real evidence* ;” psychological facts, under that of “*personal evidence*.” 8 Jud. Evid. 11, note.

(*b*) 8 Benth. Jud. Evid. 49.

(*c*) *Id. ibid.*

(*d*) *Id.* 49, 50. Best on Pres. §§ 219, 220, *et seq.*



escape the effect of facts of a criminative aspect, with which, though without fault on their part, they have become closely connected. (a)

The facts which are most frequently made the subjects of this fraudulent or deceptive action, are those which have just been described as *physical* facts,—inanimate objects, which passively receive and retain the impressions put upon them, or the appearance or position of which can be changed at the will of man. With reference to these, forgery has been well described as “an attempt to corrupt and pervert the nature of things, and thus force them to speak false. Of themselves, the things are silent; or, if they speak, speak to the inculcation of the defendant, [the criminal;] by the force he applies, a thing that was silent is made to depose falsely; a thing that was speaking against him is either made to speak in his favor, or at least put to silence.” (b) In a large sense of the term, as used in contradistinction to *psychological*, none but *physical* facts can be the subjects of forgery. (c) But there are facts coming under the denomination of *moral*, which can be simulated with perhaps the greatest ease possible. A woman who has procured the murder of her husband, and has had his body disposed of, sends out her servants before the crime is known, to inquire after him at houses in the neighborhood, as though she believed him to be absent, and knew nothing of what had taken place. (d) A woman who has administered poison to

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(a) See the case of the uncle and niece, given by Lord *Coke*, and referred to by almost every writer on circumstantial evidence. 8 Inst. c. 104, p. 282. 2 Hale's P. C. 290. 1 Stark. Evid. 83. Best on Pres. §§ 149, 202.

(b) 8 Benth. Jud. Evid. 50.

(c) *Id.* 51.

(d) Case of Mrs. *Arden*, convicted of the murder of her husband, A. D. 1551; Burke's Celebrated Trials, connected with the upper classes, 1. 5 London Legal Observer, 59. Trial of *Bathsheba Spooner* and others, for murder, at Worcester, Mass. A. D. 1778; 2 Chandler's Criminal Trials, 8.

her husband, abandons herself, on his death, to apparently inconsolable grief. (a)

Another division of evidentiary facts, is into *criminative* and *exculpatory*; having reference solely to their effect or tendency to establish or disprove the principal fact sought. Another is, into *precedent*, *concomitant*, and *subsequent* facts; expressing the natural order of their relation to the principal fact. More will be said of these in a subsequent part of this work, where a prominent use is intended to be made of them. (b)

To enumerate, with completeness, the *various descriptions* of facts which may come to constitute the materials of evidence in criminal cases, would be obviously impracticable; since they are co-extensive with their general sources, already pointed out. An acute writer, speaking of evidence in general, has observed that "there is no sort of fact imaginable, to which it may not happen to serve as evidence, with relation to some principal fact." (c) From the results of the most elaborate scientific research, down to matters so familiar and trivial as scarcely to attract the attention of a child, there is not a fact which can be made the subject of human observation, or knowledge, but may come to be placed before a jury. The whole field of physical science may thus be laid under contribution, as an aid to judicial inquiry. (d) In cases of crime, science is constantly resorted to, especially for the proof of a *corpus delicti*. Cases of homicide, in particular, daily draw upon the stores of medical and chemical knowledge.

But looking at facts and circumstances, as materials of evidence, in a more ordinary light, they have been well de-

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(a) Trial of *Katharine Nairn* and *P. Ogilvie*, 19 Howell's State Trials, 1235, 1284.

(b) See post, Part II.

(c) 1 Benth. Jud. Evid. 41.

(d) See 3 *Id.* 28.

scribed to be "as various as the modifications and combinations of events in actual life." (a) An eloquent writer has described their range in the following expressive language. "All the acts of the party, all things that explain or throw light on those acts; all the acts of others, relative to the affair, that come to his knowledge and may influence him; his friendships and enmities; his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretences and explanations; his looks, his speech, his silence where he was called to speak; every thing which tends to establish the connection between all these particulars; every circumstance, precedent, concomitant and subsequent, become parts of circumstantial evidence." (b) It is only necessary to add that circumstances, intrinsically of the most insignificant kind, but acquiring great temporary importance from their close connection with crime, are not only constantly presented in evidence before juries, but sometimes give rise to prolonged inquiry and minute discussion. In a late memorable American case, the particular mode of tying a knot on a stake with a twine string, led to the examination of numerous witnesses, and called out the expression of a variety of opinions. (c)

The great *medium* through which the evidentiary facts or circumstances which have just been considered, are made to appear to the jury, or proved to their satisfaction, is the testimony of *witnesses* under whose immediate observation

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(a) Wills, Circ. Evid. 35. "There are, in fact," observes Mr. Starkie, "no existing relations, natural or artificial, no occurrences or incidents in the course of nature, or dealings of society, which may not constitute the materials of proof, and become important links in the chain of evidence." 1 Stark. Evid. 486, 487.

(b) Burke's Works, vol. 2, p. 623; quoted in Wills Circ. Evid. 35.

(c) *The State v. Avery*, before the Supreme Court of Rhode Island, May, 1838. The string in question was one with which the deceased was found hung in a stack-yard. See 2 Beck's Medical Jurisprudence, 197, 198 (10th ed.)

they took place, or to whose senses they immediately presented themselves. In these cases, the jury perceive and know the facts only through the statements of the witnesses; the facts themselves, or, at least, such of them as bear the transient character of *events* or occurrences, having irrevocably passed away. It occasionally happens that some of them, being intimately connected with or impressed upon material objects of a permanent character, or actually having their seat in such objects, have, by that means, been preserved in nearly or entirely their original form. Of this description are, in cases of homicide, the instrument with which the mortal wound has been inflicted, articles of clothing bearing visible marks of the crime, the box in which the dead body was concealed, portions even of the remains of such body, and the like. (a) These objects are sometimes produced and exhibited in court, and viewed and handled by the jury themselves. (b) But even in these cases, there must be oral testimony to accompany and identify the objects produced. So, important facts are occasionally established by means of written instruments, such as letters, &c.; but the connection of these with the transaction must be made out in the same way. Thus it is, that the sworn statements of witnesses take the place of the original facts of the transaction, and represent them for all the purposes of the pending investigation. It is, of course, essential that they should represent them truly; and in their belief on this point, the jury are governed by the usual considerations, in addition to that universal basis of credence which is afforded by the presumption that the witnesses speak the truth, until their character for veracity is legally impeached.

We are thus brought to the most important consideration connected with this stage of the inquiry; namely, the *proof* of the facts or circumstances which are to be used as means

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(a) *The People v. Colt*, cited *ante*, p. 98, note (a).

(b) *Id. ibid.*

of arriving at the principal fact sought. It is an invariable rule that these facts, or such of them as may be necessary to the conclusion in question, must be actually *proved*, otherwise no sufficient foundation can be laid for the process of inference or presumption which is to follow. (a) The party upon whom the burden of proof rests, is bound to prove every single circumstance which is essential to the conclusion in the same manner, and to the same extent, as if the whole issue had rested upon the proof of each individual and essential circumstance. (b) But this rule, it will be observed, is confined to facts *necessary* to the conclusion. "It may, and often does happen," to use the words of an American judge, in a late memorable case, (c) "that, in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with it, and not repugnant, and go to rebut any contrary presumption." If a fact of this latter description be attempted to be proved, but the proof fails, "such failure," in the words of the same learned judge, "would not prevent the inference from other facts, if of themselves sufficient to warrant it. The failure of such proof does not destroy the chain of evidence; it only fails to give it that particular corroboration which such fact, if proved, might afford." (d)

*Proof*, then, in the strict sense of the word, is, at this stage of the trial, indispensable; and its place cannot be supplied by presumption. Thus, where the clothing of a person who has been apprehended on a charge of murder, or the floor or walls of an apartment in which that crime is supposed to have been committed, are found to be stained or

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(a) *Shaw, C. J. in Commonwealth v. Webster*, Bemis' Report, 464.

(b) 1 Stark. Evid. 502. 3 Phill. Evid. (Cowen & Hill's notes) 472, note 288.

(c) *Shaw, C. J. in Commonwealth v. Webster*, *ubi supra*

(d) *Id. ibid.*

spotted with a substance resembling blood, it cannot be *presumed* to be blood, but must be *proved* to be such by actual examination ; (a) and this is effected by chemical and other scientific tests, in the most satisfactory manner. (b) The danger of relying upon mere appearances, in such cases, unsupported by accompanying circumstances, is obvious. The spots which rust imparts to an instrument of iron or steel, like a hatchet or knife, subjected to the action of moisture, are often of a color approaching that of blood ; and sometimes, to an ordinary observer, quite undistinguishable from it. (c) The juices of certain plants and infusions of certain dyes often communicate to the dress or person, stains of a blood-red color. There are, however, necessary exceptions to this rule. Thus, where a body has been found bleeding from a mortal wound, and a knife lying near, which, together with the floor or ground, is covered with a substance resembling blood ; and traces of the same appearance are discovered, leading from the spot ; an examination, like that which has been described, would be superfluous : the facts which accompany it, in such close juxtaposition, sufficiently determining the character of the appearance observed. And if, in such a case, the traces leading from the body were followed, until they reached a person in the act of flight, whose clothing presented similar recent bloody appearances, a similar inquiry would doubtless be dispensed with. Here, the facts in relation to the blood, are, it is

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(a) Theory of Pres. Proof, 17.

(b) In the case of *The People v. Colt*, (cited *ante*, p. 98, note (a) ) spots were taken from the walls of a room, and portions of matter from the eye of a hatchet, and from the creases of a wooden floor, which, on being chemically examined, were found to be blood ; and this, notwithstanding other substances had been employed to disguise it. Where the quantity is too small for chemical analysis, the microscope may be made use of ; and this was the test employed in the case of *Commonwealth v. Webster*. See Bemis' Report of the trial, 90, and the note *ibid*.

(c) See *Id. ibid*.

true, in the nature of inferences, but they are inferences of the necessary kind, flowing from, and directly traceable to the subject of the crime itself, which is actually before the observer.

Again, a fact, in the nature of an inference, may itself be taken as the basis of a *new* inference, (whether intermediate or final,) provided the first inference have the required basis of proved fact. (a) Thus, on an indictment for arson, proof that property stolen from the house at the time it was burnt, was, shortly afterwards, found concealed in the possession of the prisoner, is presumptive evidence that he was concerned in the arson. (b) Here the inference is, first, from the finding of the stolen property, that it was stolen by the prisoner; and from this last fact, so inferred, the further inference is that he was concerned in the burning of the house from which it was stolen. But this should be supported by other evidence. (c) And the right to draw one inference from another has, in some instances, been denied. (d)

In the proof, thus to be made of these evidentiary circumstances, the two great objects to be kept in view are *completeness* and *correctness*.

1. It should be a leading object, to present as many of

(a) Best on Pres. § 187. 2 Evans' Pothier on Obl. 283.

(b) Best on Pres. § 187. 1 Greenl. Evid. § 34. *Rex v. Rickmans*, Winchester Summer Assizes, 1789, *coram Buller*, J. 2 East's P. C. 1035. In this case, the proof of the prisoners having been present in the house burnt, and implicated in the fact, was, that a bed and blankets were afterwards found in their possession, which had been taken out of the house at the time it was fired, and concealed by them from that time. *Buller*, J. doubted, at first, whether such evidence of another felony could be admitted in support of this charge; but as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, he admitted this, amongst other evidence. *Id. ibid.*

(c) See the last note.

(d) See *Hart v. Newland*, 3 Hawks, 122, 123, 124; cited in 3 Phill Evid (Cowen & Hill's notes,) Note, 289. Theory of Pres. Proof, 37.

the facts of the case, not subject to exclusion on the grounds of irrelevancy or inadmissibility, as may be practicable. It is always desirable to present *all* the facts; but this frequently proves impracticable, in consequence, either of some of them not having fallen under the notice of any observer, or of some witness who may have observed them, having died, or being otherwise inaccessible. As close an approximation to this completeness, as possible, should always be the aim of the investigating tribunal. (a) "The more the jury can see of the surrounding facts and circumstances," observes a judicious writer, "the more correct their judgment is likely to be. It is possible that some circumstances may be misrepresented, or acted with a view to deceive, but the whole context of circumstances cannot be fabricated; the false invention will have its boundaries, where it may be compared with the truth; and therefore, the more extensive the view of the jury is of all the minute circumstances of the transaction, the more likely will they be to arrive at a true conclusion." (b) And, in another passage, the same writer remarks that "a few circumstances may be consistent with several solutions; but the whole context of circumstances can consist with one hypothesis only; and the wider the range of circumstances is, the more certain will it be that the hypothesis which consists with, and reconciles them all, is the true one." (c) Indeed, where even fabricated or simulated facts are shown to be such, the object for which they were created being thus defeated, they often re-act with great force against their authors, and in this way become, in themselves, important circumstances to establish guilt, as will be more fully shown under another head.

2. The next leading object to be kept in view, in present-

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(a) As to the limits of inquiry in this respect, see the observations of Mr. Justice Clayton in the case of *McCann v. The State*, 18 Smedes & Marshall, 471, 498.

(b) 1 Stark. Evid. 20, 21.

(c) *Id.* 502, 508.



ing the facts to the jury, is to present them *correctly*, that is, as they actually occurred in connection with the transaction.

The character of a fact may be misrepresented, by the witness testifying to it, either from mistake or design; and, again, mistake may have arisen either from the want of adequate opportunity of observation, on his part, or from want or weakness of the proper powers of perception and recollection. Difficulties, from these sources, are constantly encountered in trials upon direct, as well as indirect evidence; and the rules for avoiding or overcoming them are sufficiently laid down in the standard works on evidence.

But, supposing the opportunity, faculties and fidelity of the witness to be without objection, and the fact to be represented truly by him, *as he observed it*; it may, nevertheless, be a different fact from that which actually occurred, in consequence of some *change* to which it has been subjected *before* the observation was made. Changes of this kind frequently happen to facts of the class already described as *physical* or mechanical, consisting of sensible appearances having their seat in some material substance; and this remark is especially applicable to those *indicia* which are discovered in the vicinity of a crime, immediately after it is committed. Supposing a dead body to be found with marks apparently of violence, it is of the very highest importance that all the appearances, to the minutest particular, presented by the body, and objects in its vicinity, should be immediately and accurately observed, with an express reference to reporting them in evidence, and that a faithful impression, as it were, of the whole *corpus delicti*, or subject of the crime, should be taken while its features are fresh, and before they have undergone change, either from their own perishable character, or from some extraneous act or accident. An apparently trifling circumstance,—the position of the body, the appearance of the wound, the distance at which the instrument of death is found,—may serve to

determine what is always the first question in the case; namely, whether the death was occasioned by accident, suicide, or the felonious act of another. It is so with traces of footsteps on the ground, the whole value of which, as *indicia* of crime, obviously depends upon early and minute examination. In point of fact, however, there is usually an interval between the discovery of crime, and the taking exclusive cognizance of the case by public authority, in which it becomes the subject of more or less indiscriminate observation; and it is at this stage that the identity or integrity of some of the minor facts becomes exposed to hazard, from the causes which have just been mentioned. The first observers, in cases like the one assumed, are often persons (relatives or friends,) who are so exclusively impressed by the event itself, as to overlook what, at the time, may naturally be deemed insignificant matters; to take no note of them, or, at least, none that can be confidently recalled to mind afterwards. The common attentions of humanity all partake of this summary character. The first impulse is to see what relief can be afforded in the case. The body of the sufferer is turned over, raised up, perhaps removed, the blood carefully washed from the wound, &c. In this way, important indications may, inadvertently, be wholly obliterated. But, supposing the attention of one thus humanely occupied, to be sufficiently directed to the necessity of observing and recollecting the minuter appearances of the case, a similarly injurious effect upon the evidentiary facts may be produced by the officious action of one or more persons, attracted to the spot by mere curiosity. The implement of destruction is often first discovered by observers of this class; it is handled with more or less of interest,—passed, possibly, from hand to hand among several,—until, by this very process, it is more or less deprived of the appearances which give it its peculiar value as an instrument of evidence. In this way, not only may genuine facts be destroyed and

lost, but spurious facts may be actually, though unintentionally and unconsciously, fabricated, and interpolated into the case, to the obvious deception or confusion of those who come to observe afterwards, and who may be the witnesses actually called upon to testify. (a)

But supposing the facts to have undergone no change, and to be accurately observed and faithfully reported in all respects; it may be that they belong to that class of *simulated* facts, already described, which originate in the act of the criminal himself; being contrived with an express view to deceive and mislead an observer. The requisite means of detection, in these cases, is sometimes furnished simply by a minute examination of the object or appearance fabricated, or, where these fail, by the accompanying circumstances of the case. (b) Thus, where a person has been shot by another, and the murderer, in order to give to the case the appearance of suicide, places the pistol of the deceased near his body; if the ball taken from the wound be found, on examination, to be too large to have been discharged from that pistol, the fabrication of the circumstance becomes

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(a) The marks of the recent discharge of a fire-arm may be removed, to a greater or less extent, by frequent and indiscriminate handling and examination. Minute stains of blood upon a hatchet, or other instrument, would, if recent, be obliterated in the same way; and a similar change would be produced in the appearance of a cord or string, by similar causes. In the case of *The State v. Avery*, (*ante*, p. 98, note (a)) so important an article as a portion of the string with which the deceased was found hung to a stake, was left in the possession of a witness, who cut off and gave away a portion of it. Testimony of *W. Durfee*. In the case of *The People v. Robinson*, (New York Oyer and Terminer, before *Edwards*, Circuit Judge, June, 1836,) a hatchet with a string attached, found in the yard of a house in which a murder had been committed, passed through a number of hands, before it came to be examined officially. Testimony of *R. Eldredge*, *D. Brink*, and others. And in the late case of *Commonwealth v. Webster*, an apartment in which discoveries of the greatest importance were made, was, even in the presence of the coroner, filled with persons, "every one," according to the testimony of that officer, "acting in his own way." Bemis' Report, 59.

(b) 1 Stark. Evid. 508.

apparent. (a) In reference to this object, the importance of presenting as many relevant facts in evidence as possible, becomes doubly apparent. For no matter how skilfully the fabricated fact may have been contrived, or how natural the inference which may appear to flow from it, in itself considered, there is always a difficulty, if not an impossibility, in so incorporating it with the genuine facts of the case, as to avoid the inconsistencies which must always exist between truth and falsehood. (b) The means of detecting these inconsistencies are, of course, increased with the number of the genuine facts ascertained. Minute circumstances often throw important light on these inquiries; it being found, by observation, that the facts selected for fabrication are usually those of the prominent or leading kind. (c)

The *order* in which the facts are proved is another consideration of some importance. As actually laid before juries, the evidence usually presents the facts in the order in which they were discovered; beginning with those constituting the *corpus delicti*, and the facts immediately connected with it, as indicating the perpetrator, and terminating with the remoter facts, both precedent and subsequent, as serving to increase and complete the effect of the former. In examining and combining the facts at a later stage of the inquiry, a different order may be adopted with advantage, as may be seen under a future head.

The proof of the facts constituting the materials of presumptive evidence, is made in the ordinary mode of direct proof; that is, by witnesses, swearing positively to the facts,

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(a) See 1 Stark. Evid. 505, and Wills, Circ. Evid. 80; citing the case of a citizen at Leige, from 3 Paris & Fonblanque's Medical Jurisprudence, 34, 39. See also the case of *Mary Norkott* and others, (14 Howell's State Trials 1824) and the case of Sir *Edmondbury Godfrey*, (7 *Id.* 159) which will be more particularly examined under a future head.

(b) 1 Stark. Evid. 508. See also the observations of *Shaw*, C. J. in *Commonwealth v. Webster*, Bemis' Report, 468.

(c) 1 Stark. Evid. 20, 21.

as having come under their observation ; and is subject to all the rules regulating direct evidence. Up to this point, indeed, the evidence is actually of the direct kind. It is its application to the principal fact, which gives to it its peculiar presumptive character.

It is in this proof that the essence of the case may be considered to consist ; it being the establishment of the premises from which the desired conclusion is to be argumentatively deduced. The evidence is shaped, from the outset, on the side of the prosecution, with express reference to such conclusion ; and it is always so regarded and interpreted on the side of the defence. The bearing of leading facts, proposed to be proved, is often seen at once, and their effect with the jury anticipated, even by ordinary observers of the proceedings. And the bearing of minute, indifferent or apparently trivial facts, is generally perceived, without much difficulty, by sagacious, experienced and well advised advocates. Hence, the policy of defence always is to dispute these evidentiary facts, and to dispute as many of them as possible ; to contest, throughout, the ground which is to form the basis of the proposed inference. The facts requisite to constitute this basis once conclusively proved, and satisfactorily combined in that order and connection known as a *chain* of evidence, all that the prisoner's advocate can do is to *argue* against them ; to endeavor to impress his view of the case, and his construction of the evidence upon the jury ; and to induce them to adopt them as their own ; and the hopelessness of this portion of his duty is, no doubt, often felt even in the act of discharging it. Accordingly, it is at the stage of *proof*, that the great struggle always takes place. Facts, seen to be of an oppressive character, are sought to be got rid of, by the usual expedients of cross-examination, proof of facts of a contradictory, explanatory, or exculpatory tendency, or, in the last resort, attacks on the veracity of the witnesses. Sometimes, the whole force

of the defence is concentrated against a single fact which is seen to occupy an important place, as a connecting link between others, with a view of *breaking the chain* of the evidence. If the affirmative facts cannot be got rid of, the constant policy is to complicate them with conflicting circumstances, or cloud them with doubts sufficient to affect their impression on the jury.

This policy of the defence, on criminal trials, is most clearly manifested in cases where the affirmative view or theory is sought to be made out by circumstantial evidence of the *certain* kind ; as where the conclusion sought is seen to flow *necessarily* from the facts proved. Thus, supposing the case proposed to be proved, to be this:—A. B. entered a room containing a watch,—the watch was gone, upon his departure,—and no agent but A. B. had access to the room, in the interval. If these facts are satisfactorily proved, the conclusion that A. B. took the watch *must* follow, and cannot be averted by any argument. The only practicable mode of defence, therefore, is to assail the facts ; to take issue upon each, and attempt to disprove it : as by endeavouring to show, either that it was not A. B. who entered the room, as charged, but some other person ; or, admitting that he did enter the room, that the watch was not there at the time ; or, admitting it to have been there when he entered, that it continued to be there after he left, no proper search having been made for it ; or, admitting it to have been actually taken away, that some other person had access to the room, during A. B.'s stay, by whom it might have been taken.

## SECTION III.

*The process of Inference or Presumption.*

Having generally considered, first, the fact to be proved, or the affirmative hypothesis of the case under investigation, namely, the guilt of the accused ; (a) and, secondly, the evidentiary facts from which it is to be deduced, inferred or presumed ; the next subject for consideration is the *process* of *inference* or presumption itself.

The great object with which every criminal trial is entered upon, is to create a presumption of guilt strong enough to warrant a conviction of the accused ; and to attain this, a two-fold process is always necessary ; the presumption must first be *raised*, that is, it must have a proper substance, shape and application given to it, in order to constitute a subject for consideration ; and, it must next be *tested*, for the purpose of ascertaining its sufficiency as a basis of final decision.

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(a) By some of the best writers on evidence, the term "hypothesis" is constantly used in a comprehensive sense, to denote the general idea, proposition or statement that the accused is guilty, or innocent ; expressing the sum of all the particulars of the case, as it is proposed to be proved, or contended to have been proved, in the form of one general result. In this sense of the term, the affirmative hypothesis is the single *general proposition* or statement,—the proposed or assumed general fact—that the accused is guilty of the crime charged. It is otherwise called "the hypothesis of guilt" or delinquency : and is considered as merely another name for the *principal fact*, or *factum probandum*, of the case. Best on Pres. §§ 210, 212. 8 Benth. Jud. Evid. 18, 24, 25. But the term "hypothesis" is also frequently used to denote the entire view taken of the case, on either side, or the theoretical statement of the case in detail, as it is supposed to have actually taken place, and as it is proposed to be made out, or contended to have been made out by the evidence: the facts composing it being arranged and connected in a certain order and relation. In this sense, the affirmative hypothesis or theory is the view or statement, at least in outline, of the *entire case*, on the side of the prosecution, as it is supposed to have occurred ; showing by a combination of particulars, *how* the accused is guilty of the crime charged.

This whole process is, in both the stages just mentioned, essentially one of *comparison*. In the first stage, it is a comparison between the facts proved and the affirmative hypothesis, in order to ascertain their agreement, consistency or coincidence with it, and the extent of such coincidence: and, in the final stage, it is a comparison of the same facts with the opposite or negative general hypothesis of innocence, or of such particular opposite hypotheses as may be resolvable into it, in order to determine whether and how far it may be reconcilable with any of them. Sometimes the entire process is very short; the circumstances though few, not only thoroughly coinciding with the affirmative hypothesis, but excluding, at once, all others. Thus, in the example given at the close of the last section, the three facts,—that A. B. entered a room containing a watch,—that the watch was gone upon his departure,—and that no agent but A. B. had had access to the room, in the interval,—make up a case of conclusive proof that the watch was taken by A. B.; the supposition that it might have been taken by any other agent being entirely excluded. (a) There is always a process of reasoning employed in such a case, but it is of that close description, (answering to the *argumentum necessarium* (b) of the civilians,) in which the facts stand in such a strictly logical relation of premises and conclusion, that, the former being once established, the latter *must* follow.

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(a) See 1 Stark. Evid. 483. The word "agent" is here very properly employed in its broadest sense, without limitation to *persons*. To authorize the conclusion, the facts proved should absolutely exclude the agency of any living being. *Animals* have been known to remove objects, sometimes of considerable magnitude, and to considerable distances; their habits giving them means of access to places which would naturally be overlooked, where the possibility of agency of this description was not at all taken into view. See Best on Pres. § 219.

(b) Matthæus De Criminibus, c. 6. *Ante*, p. 22.



But in the great majority of actual cases, the truth of the hypothesis sought to be established, is not thus speedily and logically made clear, beyond the possibility of doubt. The conclusion is arrived at gradually, sometimes laboriously, by a process of *probable* reasoning, in the course of which, free scope and discretion are allowed to the judgment, in examining, comparing and weighing the facts presented, and in ascertaining their individual and united bearing and tendency; and the ultimate result of the whole investigation is acquiesced in, not because of its absolute certainty, but because of its freedom from all reasonable doubt. (a) In other words, the evidence is of the *presumptive* kind, properly so called; and the process employed in dealing with it, is that of presumption, as it has already been explained. (b)

The discovery of *truth* being formally propounded as the express object of inquiry in every criminal trial, (c), the great question to be finally considered and answered by the jury undoubtedly is,—“Is the hypothesis of guilt true?”—their verdict being, according to its strict import, a *declaration of the truth* in regard to it. But as the truth sought in these cases is not of the absolute and necessary, but only of the probable and contingent kind, this question always resolves itself, at least preliminarily, into another—“Is the hypothesis of guilt *probable*?” Probability is always the essential basis of investigation, (d) although mere probability, as will be shown, is never sufficient as a basis of decision. It must be raised to a proper degree of persuasiveness and force, before it can satisfy the judgment that the conclusion which it indicates is the truth.

The facts, then, as presented by the evidence,—are, in the first place, to be examined, in order to ascertain whether

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(a) 1 Greenl. Evid. § 1. See post, Section IV.

(b) See Chapters II. and III.

(c) See ante, p. 98.

(d) See ante, p. 80.

and to what extent, they render the affirmative hypothesis, or principal fact, probable ; (a) and, in the natural course of such an examination, they are looked at, first, singly, and then collectively ; certain general principles or results of previously acquired knowledge, observation and experience, being recurred to and employed throughout, as standards of comparison. The *usual* and *natural course of things* is the great and efficient preliminary test in these cases. Where a fact has, from experience and observation, been found to be constantly associated or connected with another, as its cause, concomitant or effect, the prospective or general presumption is, that it *will*, most probably, be found associated with it again, and in a similar relation. Accordingly, where the latter fact is, in any given case, proved to have actually existed, the presumption, which is now retrospective and special, is that the former *did* actually exist also ; (b) and this presumption is stronger or weaker, according to the closeness and frequency of the observed association itself. Thus, supposing, on a trial for murder, the evidentiary facts or circumstances to be these, (a *corpus delicti* being first fully proved ;)—the accused had been on ill terms with the deceased,—had been heard to threaten his life,—had actually made an attempt against it,—was seen in the immediate neighborhood of the place where the crime was committed, about the time of its commission,—was found to have fled or concealed himself soon after,—was observed to betray agitation or confusion on being arrested,—and was found, on examination, to have his clothing stained with blood. (c) Each of these facts, considered separately, in the light of

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(a) Or “probabilise” it, to use a word of the coinage of Mr. *Bentham*. 8 Benth. Jud. Evid. 18, *et passim*.

(b) See 1 Stark. Evid. 493, 494.

(c) An example presenting similar facts is made use of by the civilian *Matthæus*. De Criminibus, ad lib. 48, Dig. tit. 15, c. 6 ; cited on the trial of Capt. *Green* and his crew. 14 Howell’s State Trials, 1258.

the general principles or results which have been mentioned, tends to render the hypothesis of guilt a probable, or, at least, a not improbable one. That a *threat*, growing out of previous ill-will, should be followed by attempts to carry it into execution, is in accordance with the natural course of human conduct, as shown by observation. That an *opportunity* afforded by close proximity of the person, should, under the influence of an adequate motive, be taken advantage of, is probable for the like reason. That the *blood* of the person killed should *stain* the dress of the person shedding it, is a natural result of the physical relations of the objects. That *flight* from pursuit, and *terror* on arrest should indicate guilt, accords with the ordinary constitution of human nature, and the constant observation of human conduct. In this way, each fact proved contributes, though in different degrees, its share of effect in rendering the hypothesis probable. Each is such a fact as would naturally be looked for, in such a case ; being regarded, in the abstract, as a natural element, incident or accompaniment of crime, and, when actually shown in evidence, having a corresponding significance assigned to it. But there remains another and most important step in the process of examination. Not one of the circumstances above enumerated would, *singly* considered, justify an inference of guilt. They are to be taken and viewed collectively, and in their common bearing upon the fact sought ; and it is this part of the process which serves to complete the foundation on which the presumption in favor of the affirmative hypothesis of guilt is raised. All this will be more particularly illustrated in the sequel.

It has already been sufficiently explained, how a fact sought, and at the time unknown, comes to be associated and connected with a fact or facts proved ; its existence being thus indirectly reached and shown. It is because such a connection has been repeatedly found, by experience, to have existed *before*. This connection need not be necessary or

absolutely invariable, no instance to the contrary having ever been observed. It is sufficient, if it be *ordinary* and usual. (a) But it must be more than simply *frequent*; (b) at least, where the facts connected are principally relied on.

The mental process employed in raising a presumption, is as already observed, one of *comparison*; and that, not only in the general sense of reference to a common abstract standard of probability, or to one or more assumed hypotheses, but also in a much more particular sense; namely, the comparison of one fact or circumstance with another. In dealing with circumstantial evidence, juries are constantly employed in noticing and weighing coincidences, resemblances, and analogies of every possible kind. These sometimes run to great minuteness of detail; as where one evidentiary fact of the *physical* class is immediately compared with another:—foot-marks, with the feet of the party accused; the print of a left hand, or other traces of its use, at the scene of crime, with the fact of the accused being a left-handed person; a piece of paper, composing the wadding of a fire-arm, with a similar and corresponding piece, found in the pocket of the prisoner; the cut edge of a piece of cloth stolen from a loom, with the corresponding edge of a piece found in his possession. It is thus a process by which the accused is *connected* with the crime charged, by a variety of ties or chains, consisting of the resemblances or coincidences which have been mentioned; and, by such means, is singled out and identified as the person by whom it was committed. Finally, it is a process by which the appearances presented by the facts in evidence, and which it becomes necessary to explain on some rational principle, are, with reasonable probability *accounted for*. The hypothesis of guilt is assumed as the true or probable one, because it accounts for the facts proved; just as, in natural philosophy, an hypo-

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(a) Parke, J. in *Doe dem. Patteshall v. Turford*, 3 B. & Adol. 890.

(b) Henderson, J. in *Hart v. Newland*, 3 Hawks, 122, 123.

thesis founded upon certain observed phenomena, is adopted, because it accounts for such phenomena. (a)

Such is an outline of the process by which a presumption of guilt is preliminarily *raised*, upon a basis of facts proved in the particular case tried. It is obviously an aggregation of various minor presumptions, deducible from each separate fact, into one single expression of belief. The next process, namely, that by which its sufficiency is *tried*, will now be considered in the same general way.

The hypothesis of guilt, though presented with great prominence, by the very form of the proceedings, is not the only one to be considered in the investigation; nor is it sufficient that the facts proved are affirmatively found to coincide with it, however fully. The probability of the conclusion arrived at by the jury, must be something more than *mere* probability. It must be raised to a higher degree of force, before it can be adopted as a satisfactory basis of conviction. This is done by taking up whatever *opposite* suppositions or hypotheses, involving the general one of innocence, may be reasonably conceived possible, and negating or excluding them, as will be hereafter explained. The very terms of the issue which the jury are to try, present a plain question between the two opposite general hypotheses of guilt and innocence; and the whole course of the proof laid before them, renders a constant reference to both these hypotheses a matter of obvious necessity. Indeed, it is of the essence of all presumptions of fact, that they always contemplate an opposite side; standing good, (in the language of the maxim,) *until the contrary is proved*. Hence the whole process involved in the presentation of presumptive evidence, on a criminal trial, is one of raising presumptions, on the one side; and rebutting, weakening or destroy-

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(a) See 1 Stark. Evid. 483, note; where philosophical proof as to the relations of cause and effect, in the natural world, is compared with judicial proof by circumstantial evidence. And see 1 Greenl. Evid. § 11.

ing them, on the other. And the action of the jury, in dealing with such evidence, is in a corresponding course; the criminative facts presented by the prosecutor being first examined, to see, if in themselves, they raise an adequate presumption of guilt; and, if this be so, then the facts proved on the part of the prisoner, to see how far they affect such presumption. And, even in the absence of facts positively proved, in the way of defence, there are certain considerations founded on the possibility of innocence, which are frequently taken into account, in estimating the force of the criminative facts proved. These considerations,—under the several names of infirmative suppositions, hypotheses and facts, counter-possibilities, and supposable facts,—have received a large share of attention in some standard works on evidence; and for that reason, as well as on account of their intrinsic importance, seem to require some explanation in this place.

Supposing, then, an evidentiary fact testified to, and considered as proved, (*a*) and the principal fact in question considered as being thereby, in a certain degree, rendered probable; (*b*) it will often happen that, by the bare consideration of some *other* fact, which is *not proved*, nor so much as attempted to be proved, the principal fact will be considered as being, in a greater or less degree, rendered improbable. (*c*) And the reason of this has been thus explained. The existence of this other fact (*d*) (which may be termed for the sake of distinction, an opposite or counter-fact,) being supposed, (it being itself, in the case in question, not impossible,) it will be seen that, notwithstanding

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(*a*) This explanation is taken from Mr. *Bentham's* work on Judicial Evidence, with a slight variation from the peculiar language employed by that author. 8 Benth. Jud. Evid. 18, 14.

(*b*) Or “probabilized,” to use Mr. *Bentham's* expression. 8 Jud. Ev. 18.

(*c*) Or “disprobabilized.” *Id. ibid.*

(*d*) “Disprobabilizing fact,” as it is termed by the same writer. *Id. ibid.*

ing the existence of a fact rendering the principal fact probable, the existence of such principal fact is not, *in so high a degree* probable, as it would be, if the existence of the opposite fact were *impossible*. In other words, the tendency of such an opposite fact is to weaken, or render *infirm* the probative force of the evidentiary fact proved; and for this reason, it has been termed an *infirmative* fact. (a)

Thus, supposing it fully proved, in a case of murder, that the accused had been heard to threaten the life of the deceased, shortly before the commission of the crime; it may be, it is not impossible, nor, indeed, to a great degree, (considering the fact by itself,) improbable, that this threat was never carried into effect by the former. For, although threats are often made good, they also often turn out to be mere idle words, uttered with a view to alarm or disquiet; or spoken in moments of excitement, and without any settled purpose of evil. (b) This is an infirmative fact or supposition, applicable to the affirmative or criminative fact, and tending to weaken its force. Again, supposing it proved that the accused was seen at or near the place where the crime was committed, about the time of its commission,—the evidence not excluding the possibility of the presence of *other* persons at the same time and place,—the presence of the accused, at that particular juncture may have been a merely fortuitous coincidence. (c) So, admitting it proved that stains of blood were found upon his clothing, it may be that they

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(a) 8 Benth. Jud. Evid. 14. Best on Pres. § 217, *et seq.* Instead of “infirmative,” the term “exculpatory” is used by some writers. Wills, Circ. Ev. 120, *et seq.*

(b) This, together with the other criminative facts supposed, will be more fully considered in the next general division of the subject. See Part II.

(c) That the presence of a person, even repeatedly, at a particular place privately designated by another, may be regarded as accidental, see the singular case of *William Barnard*, (19 Howell’s State Trials, 815,) commented on by Mr. *Starkie*, (1 Stark. Evid. 507, note,) and further noticed, *post*.

were produced by some entirely innocent cause, actual examples of which are not wanting. (*a*)

It has been said by a writer already quoted, who appears to have devoted much attention to the subject, that there are few, if any, evidentiary facts, by which the existence of a principal fact is rendered probable, which are not liable to be qualified by at least one, commonly, more than one—of these infirmative considerations; and that the proper administration of justice requires that no fact of the latter description, perceived to be capable of having place, should be overlooked; but that its probative force should be estimated as carefully as that of those of a positively criminative character. (*b*) The principal use, however, of these appliances appears to be, in cases where one or two prominent and impressive facts, among others, are relied on to criminate the accused, to diminish their proving power, or detract from their conclusive quality. On the other hand, where the evidence is composed of a considerable number of consistent and mutually supporting facts, contributing more equally to the general conclusion indicated, the force and range of these infirmative suppositions are much reduced, as will be more fully shown hereafter. (*c*) And, as a general rule, they ought to be applied not singly, but collectively, at a later stage of the process, in the form of *hypotheses*, to the whole mass of criminative facts taken together; and not to each or any individual fact as it is proved, without reference to others. (*d*) For, as the presumption in favor of the truth of the affirmative hypothesis, was effectually raised only by taking the facts and circumstances from which it was deduced, *collectively*; it is reasonable that,

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(*a*) Case of *William Shaw*; Theory of Pres. Proof, Appendix, Case viii. 6 London Legal Observer, 476.

(*b*) See 8 Benth. Jud. Evid. 14, 15.

(*c*) See *post*, in this section.

(*d*) See *ibid*.



when assailed, it should be assailed in the same form, and upon the same foundation.

In treating, more particularly, of the process of presumption from facts proved, in criminal cases, what is called the *probative force*, (*a*) or proving power (*b*) of such facts,—that is, their competency to establish the probability, and, by that means, the truth of the principal fact or affirmative hypothesis,—becomes a very important subject of consideration.

The probative force of a body of circumstantial evidence is said to depend upon the following considerations; namely, (1) the number, (2) the independence, (3) the weight, and (4) the consistency of the elementary or component circumstances themselves. (*c*)

1. As to the *number* of the circumstances, the great importance of presenting to a jury as many of the facts of a transaction as possible, as a means of reviving the whole transaction with the greatest accuracy and effect, has already been dwelt upon. (*d*) But the operation of number—of the mere addition of one fact to another,—is more strikingly seen in its power of heightening *probability*. A single fact,—say, the first fact proved in the case,—may produce no more than a slight impression of the probability of the hypothesis proposed; the next fact proved, though, in itself, of the same slight kind, will, taken (as it must be,) in connection with the preceding, often raise this impression to a determinate and very considerable degree of force. (*e*) In this way, a number of circumstances, each individually of slight significance, may so tally, and confirm each other,

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(*a*) 3 Benth. Jud. Evid. 219. Best on Pres. § 188.

(*b*) Wills on Circ. Ev. 214.

(*c*) Best on Pres. § 188.

(*d*) See *ante*, p. 139. 1 Stark. Evid. 20, 502, 503. As to the effect of number in the detection of fabricated evidence, see *Id. ibid.* And see 3 Phill. Evid. (Cowen & Hill's notes,) Note 238.

(*e*) See 3 Benth. Jud. Evid. 222, 223.

as to leave no room for doubt of the fact they tend to establish. (a) The importance of number becomes still more apparent, when it is considered that the effect of increase in this respect, (provided the circumstances themselves have the quality of *independence* which will next be considered,) is not only to increase, but actually to *multiply* the probability of the conclusion sought. (b) Or, to speak in mathematical language, the probability of the justness of the conclusion, is not merely the sum of the simple probabilities created or afforded by the individual circumstances, but is the multiplied or *compound* ratio of them. (c) Thus, (to borrow an illustration from a writer already quoted,) on an indictment for uttering a bank note, knowing it to be counterfeit, proof that the accused uttered a counterfeit note, amounts to nothing, or next to nothing,—any person might have a counterfeit note in his possession: but suppose further proof adduced, that shortly before the transaction, he had, in another place, and to another person, offered another counterfeit note, the presumption of guilty knowledge becomes very strong. (d) And it might be added that if still further proof were made of a similar kind, as of the offer of a third or fourth note, the presumption would soon become conclusive. (e)

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(a) Best on Pres. § 188.

(b) “Probable proofs,” says *Butler*, “by being added, not only increase the evidence, but multiply it.” *Analogy*, part 2, chap. 7. The same writer has remarked in another passage, that “the slightest possible presumption, often repeated, will amount to moral certainty.” *Id.* *Introd.* And see the observations of *Shaw*, C. J. in *Commonwealth v. Webster*, *Bemis’ Report*, 467, 468.

(c) Best on Pres. § 188. 1 *Stark. Evid.* 497, and note. 2 *Evans’ Pothier on Obl* 292. This has been shown to be mathematically as well as morally true; and algebraical formulæ have been employed to illustrate it. Best on Pres. Appendix, Note L. See 1 *Stark. Evid.* 497, note. But the practical utility of such calculations, as aids to judicial inquiry, especially in criminal cases, may well be doubted. *Id. ibid.* 470, 501.

(d) Best on Pres. § 188.

(e) See 1 *Phill. Evid.* 473. 8 *Id.* (Cowen & Hill’s notes), Notes 824, 825,

The effect of increase in the number of criminative facts upon their probative force as evidence, consists in its power to reduce the force, narrow the range, and finally to exclude the application of those *infirmative* considerations before mentioned, to which such facts may, individually, be subject. Thus, if but one or two facts of a criminative tendency are met and attempted to be qualified by such considerations, supposing their probative force to be, by that means, actually reduced, the addition of other facts, not thus qualified, tends to restore the former to their original force. If, on the other hand, a more extensive use be attempted to be made of such infirmative considerations, the greater the number of criminative facts proved, the greater the number of infirmative considerations which will be necessary to meet them. But increase in number has, with the latter, an effect the reverse of that which it has with the former ; it tends to diminish their probability in a similar ratio. Thus, it is possible,—taking the suppositions singly,—that a threat to kill, though uttered under the influence of settled ill-will, may not have been carried into effect ; *or*, that proximity to a scene of murder, at the time of its commission, may have been purely accidental ; *or*, that stains of blood on the clothing may have arisen from some innocent cause. We may say, indeed, that either of these supposed facts, taken by itself, is not positively improbable. But that *all three* of them should have been the facts in the particular case, may safely be pronounced a far less probable supposition ; and the improbability of the joint truth of all would be found to increase rapidly, with the addition of every separate supposition. (a)

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326. Roscoe's Crim. Evid. 90. See also *Commonwealth v. Woodbury*, Thacher's Criminal Cases, 47. *Commonwealth v. Percival*, *Id.* 293.

(a) As to the effect of number upon physical coincidences, see *post*. As to the consideration of number, in its application to witnesses, see 1 Stark. Evid. 465.

2. But, in order to give to the facts proved the full effect of number, it is further essential that they should be *independent* of each other; that is, so far as respects the evidence by which they are presented. (a) If they are not independent, and all arise from one source, an increase in the number of the circumstances does not increase the probability of the hypothesis attempted to be proved by them. (b) Hence, where all the facts are proved by the testimony of one witness, as they all rest upon one foundation,—the veracity of a single person,—addition to the number of facts will not increase the strength of the proof. (c)

The increase of force produced by the concurrence of independent *circumstances*, has been well illustrated by comparing it to the effect of a relation of the same fact by several independent *witnesses*. If the witnesses to the fact be dependent on each other, so that the testimony of the second depends, for its truth, upon the first; that of the third, upon the second, and so on; the effect of the evidence actually diminishes with every increase in the number of the witnesses or the facts. (d)

According to Mr. *Starkie*, “the force of a particular inference, drawn from a number of dependent facts, is not augmented, neither is it diminished, in respect of the number

(a) Mr. *Starkie* has distinguished dependent and independent facts in the following terms. “If the facts A. B. C. D. be so essential to the particular inference to be derived from them, when established, that the failure in the proof of any one would destroy the inference altogether, they are dependent facts: if, on the other hand, notwithstanding the failure in proof of one or more of those facts, the rest would still afford the same inference or probability, as to the contested fact, which they did before, they would be properly termed independent facts.” 1 *Stark. Evid.* 495.

(b) *Best on Pres.* § 188.

(c) *Theory of Presumptive Proof*, 57.

(d) *Wills*, *Circ. Evid.* 214. This writer employs an arithmetical illustration of the fact stated. And see 1 *Stark. Evid.* 466. See also, the remarks of Mr. *Bentham*, as to the meaning of the term “chain of evidence.” 8 *Jud. Evid.* 223—225, note.

of such dependent facts, provided they be established; but the probability that the inference itself rests upon sure grounds, is, in general, weakened by the multiplication of the number of circumstances essential to the proof; for the greater the number of circumstances essential to the proof was, the greater latitude would there be for mistake or deception. On the other hand, where each of a number of independent circumstances, or combinations of circumstances, tends to the same conclusion, the probability of the truth of the fact is necessarily greatly increased, in proportion to the number of those independent circumstances." (a)

3. The *weight* of the individual circumstances comes next to be considered. This is constantly found to vary in every combination presented by evidence; some facts affording only a slight presumption of the truth of the hypothesis; others, that stronger degree which is sufficient to establish it, unless weakened, rebutted, or destroyed by opposing facts; others, more rarely, reaching that high grade of efficacy, denominated *conclusiveness*. The precise signification of the latter term seems to require some notice.

The most common application of the epithet "conclusive," is to the *final* effect of a number of facts taken *together*, and constituting a body of evidence; producing a degree of persuasion or assurance, which shuts up the mind to the adoption of one indicated conclusion, and excludes or shuts out every other. (b) In other words, it is that effect of evidence which gives it the character of *proof*, or converts it into proof. (c) But the term "conclusive" is also frequently applied, by the best writers, to the effect of *particular* circumstances in a body of presumptive evidence, considered independently of others, or in comparison with others; denoting great superiority of weight; or decisive,

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(a) 1 Stark. Evid. 495, 496.

(b) *Id.* 506, 509. Shaw, C. J. in *Commonwealth v. Webster*, Bemis' Report, 462.

(c) 1 Stark. Evid. 506, -507.

convincing, overpowering weight: circumstances of an opposite character being denominated *inconclusive*, or imperfect. Thus, facts or circumstances of the class termed *moral* and the coincidences they afford, and the probabilities deducible from them, are regarded by Mr. *Starkie*, as of a conclusive tendency, in contrast with those of the physical or mechanical class, which are spoken of, as being, in their nature, imperfect and inconclusive. (a) So, Mr. *Bentham* applies the term "conclusive" to a single evidentiary fact; and undertakes to give practical directions for ascertaining conclusiveness in such a case, by means of infirmative suppositions. (b) It will be seen, however, that this writer gives to physical facts a higher capacity of conclusiveness than Mr. *Starkie*. (c)

What is meant by a conclusive, and what by an inconclusive circumstance, may perhaps be more adequately explained by an example than a definition. The following, taken from the writer last named, furnishes a very simple illustration. The circumstance of finding an article which has been recently stolen, in the possession of a person charged with the theft, though of a highly suspicious nature, is, in itself, imperfect and inconclusive; and therefore quite insufficient as a basis of conviction. But if, in addition to this, it be proved that the party accused wholly refused to account for the possession, or attempted to impose a false account, the latter circumstance is said to be *conclusive*. (d) It will be seen from this, that conclusiveness, as applied to circumstantial evidence of the presumptive kind, is not a quality absolutely belonging to a fact, in itself considered, but is the result of union with something else. The two

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(a) 1 Stark. Evid. 487, 497. As to physical and moral coincidences, see *post*, in this section.

(b) 8 Jud. Evid. 220, 221.

(c) *Id.* 224—226.

(d) 1 Stark. Evid. 488. *Id.* 483, 484, note. It is also said to be of an *exclusive* nature, forcibly tending to exclude any supposition of an honest possession. *Id. ibid.* See another example of conclusiveness, *Id.* 497, 499, note.

circumstances in the example must be considered together; the latter is based upon the former, and indeed necessarily implies its existence. The former, without the latter, would be incomplete; with the addition of the latter, it becomes complete and consequently conclusive. (a)

In the case of circumstantial evidence of the *certain* kind, it may happen that a single fact, clearly proved, becomes in itself conclusive. Thus, the single fact of an *alibi*, made out on the part of a prisoner, to the complete satisfaction of the jury, will dispose at once of the whole accusation. But this rarely or never happens on the part of the prosecution, especially in capital cases; it being always considered dangerous to convict on the strength of any single circumstance. (b)

To return to the more general term "weight," employed in introducing the present subdivision of the subject. The value of weight, as a quality of circumstances, may be most aptly appreciated, by considering it in connection with that of *number*, which has been already treated of. Each of these qualities, when present, adds immensely to the force of the other; but each of them has also the effect of compensating, to a certain extent, for the absence of the other. The more weighty the circumstances individually are, the smaller the number necessary to authorize a conclusion. The union of even two or three strongly criminative facts may be sufficient for this purpose. On the other hand, mere number constantly has the effect of giving a determinate resulting weight to facts individually of slight significance. This has been sufficiently explained under a previous head.

4. The *consistency* of the facts constituting a body of evidence, with each other, and with the hypothesis or principal fact sought to be deduced from them, is another important consideration in determining their aggregate proving power. The consistency of these facts with the hypothesis of guilt

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(a) 1 Stark. Evid. 509.

(b) Best on Pres. § 216. See 3 Benth. Jud. Evid. 12, 18.

is, indeed, under all circumstances, essential ; its ascertainment constituting, as shown at the commencement of this section, the first stage in the process of establishing the presumption required. "Therefore," to use the words of a learned American judge, in a late important case, "if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends, and however plausible or apparently conclusive the other circumstances may be, the charge must fail." (a)

The consistency or harmony of the evidentiary facts or circumstances with *each other*, may also be pronounced an essential condition to the deduction of any satisfactory inference from them, as a body. An opposite state of the facts always impedes the progress of the mind from its premises to its conclusion ; breaks that uniformity of concurrence by which the facts, of themselves, indicate the end sought ; and produces obvious confusion, often ending in permanent doubt, on the part of the tribunal. Where this inconsistency is found to prevail between leading facts, or such as are essential to the conclusion, it is as destructive of that conclusion as inconsistency with the hypothesis of guilt itself ; being, in fact resolvable into it. (b) But where the facts are found to agree in their leading features, a slight *incidental* inconsistency will not affect the case. Thus, where A. being in company with B. had his pocket picked of *three* guineas, and B. afterwards boasted to C. that he had picked A.'s pocket of *four* ; the substantial fact is that he picked A.'s pocket, and an accidental inaccuracy of A. or B. as to the number, would not weaken the case. (c)

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(a) *Shaw*, C. J. in *Commonwealth v. Webster*, Bemis' Report, 469. And see 1 Stark. Evid. 505. 2 Evans' Pothier on Obl. 289, 291.

(b) See 2 Evans' Pothier, *ubi supra*.

(c) 2 Evans' Pothier on Obl. 291, note (Phil. ed. 1858;) cited in 8 Phill. Evid. (Cowen & Hill's notes,) Note 288. And see 1 Stark. Evid 468.



It is to be observed, however, that inconsistency is never a natural attribute or condition of facts, considered in themselves, or in the light of actual truth. The genuine facts of any particular case or transaction, as they actually occurred, must necessarily have been consistent with each other, or they could not have happened. (a) Their inconsistency, as presented in evidence, arises always from one of two causes,—incorrectness or incompleteness in the presentation of them. (b) Both these are sometimes the faults of the medium of evidence itself; the facts undergoing more or less of change, in the course of their transmission through the witness to the juror, in consequence either of infirmities naturally incident to the medium, and scarcely separable from it, or of actual design on the part of the witness. (c) In other cases, inconsistency arises, not from any fault of the medium, but simply from the circumstance that all the facts have not been observed, and cannot therefore be presented; or that some fact has not been observed at the proper time, and has undergone a change in its outward appearance. Facts, or outward appearances, which have been fabricated by the criminal himself for his own protection, are always inconsistent with the realities of the case, and are always intended to be so; but owing to the artifice employed in fabricating them, the moral facts which accompanied and produced them, and which if observed would have entirely removed the inconsistency, have been hidden from human view. But even in these cases, the inconsistency thus artificially produced, often serves a useful purpose in leading to a minute and rigid scrutiny of the circumstances, and consequent detection of the fraud. (d)

5. The foregoing considerations are chiefly applicable as

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(a) 1 Stark. Evid. 20, 482. See the observations of *Shaw*, C. J. in *Commonwealth v. Webster*, Bemis' Rep. 469.

(b) See 1 Benth. Jud. Evid. 28.

(c) See 1 Stark. Evid. 20.

(d) *Id.* 21, 503.

tests of probative force, to a body of criminative facts, considered in itself, and without reference to opposing evidence. But there is another and very important consideration, tending to the same end, and which naturally occurs next in order, drawn directly and exclusively from a contemplation of the opposite side of the case;—namely, the *production* or *non-production*, on the part of the accused, of evidence of an *exculpatory* tendency, and the force of such evidence when produced.

According to the universal rule of evidence, proof must be made, in the first instance, on the part of the prosecution, of facts sufficient to raise a presumption of guilt, before the prisoner can be called on to make his defence. (a) This proof being made, the latter is always entitled to meet it, by producing evidence in denial or explanation of the charge; and in fact, is bound to this course, the burden of proof being now thrown upon him. If no such counter-evidence be produced, then, according to the strict application of a leading maxim, the presumption which, before, was only contingent and conditional, becomes, from that very circumstance, absolute and conclusive. But, in practice, the rule is applied with an important qualification. The *power* of the party to produce such counter-evidence, is always taken into the account. Indeed, this is a point of view in which the evidence on both sides is always to be considered. “It is certainly a maxim,” observed Lord *Mansfield*, in the case of *Blatch v. Archer*, (b) “that all evidence is to be weighed according to the proof which it was in the *power* of one side to have produced, and in the power of the other to have contradicted.” But, taking this last maxim, for the present, in its application to the defence only, it may be illustrated

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(a) See the observations of *Bayley, J.* in *Rex v. Burdett*, 4 B. & Ald. 149; and of the Chief Justice, *Id.* 161, 162. 1 Phill. Evid. 486.

(b) Cowp. 63, 65. See 1 Stark. Evid. 487. 2 Evans' Pothier on Oblig 289, 290.

by a few further considerations. It rests on the broad presumption that a man will do that which tends to his obvious advantage, if he possess the means. (a) On this ground, it is remarked by a learned writer, that "if, on the supposition that a charge or claim is unfounded, the party against whom it is made, has evidence within his reach, by which he may repel that which is offered to his prejudice, his omission to do so supplies a strong presumption that the charge or claim is well-founded; it would be contrary to every principle of reason, and to all experience of human conduct, to form any other conclusion." (b)

Again, a party's power to produce evidence in his defence, may be inferred from his situation, or the nature of the case itself. The following extracts from the opinions of the court of King's Bench in the case of *Rex v. Burdett*, (c) very aptly illustrate this point. Presumptions of guilt, observed Mr. Justice *Holroyd*, in that case, (d) "stand only as proofs of the facts presumed, till the contrary be proved; and those presumptions are either weaker or stronger, according as the party has, or is reasonably to be *supposed* to have it in his power to produce other evidence, to rebut or to weaken them, in case the fact so presumed be not true; and according as he does or does not produce such contrary evidence. It is established, as a general rule of evidence, that, in every case, the *onus probandi* lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he is charged; but when such proof has been given, it is a

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(a) 1 Stark. Evid. 487.

(b) *Id.* 488. See 8 Phill. Evid. (Cowen & Hill's notes,) Note 288.

(c) 4 B. & Ald. 95

(d) *Id.* 140.

rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved, were not true." The remarks of the Lord Chief Justice were still more forcible. "In drawing an inference or conclusion from facts proved," observed the learned judge, (a) "regard must always be had to the nature of the particular case, and the *facility* that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends!" The same rule has been very guardedly laid down by Mr. Chief Justice *Shaw*, in the late case of *Commonwealth v. Webster*. (b) "Where probable proof is brought of a state of facts tending to criminate the accused, the absence of all evidence tending to a contrary conclusion, is to be considered,—though not, alone, entitled to much weight; because the burden of proof lies on the accuser, to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances, as they existed, and show, if such were the truth, that the suspicious circumstances can be accounted for, consistently with his innocence, and he fails

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(a) 4 B. & Ald. 161, 162.

(b) Bemis' Report of the Trial, 467, (Boston ed. 1850.)

to offer such proof ; the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied ; and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution."

To return to the preliminary process of raising a presumption from facts proved. The essential basis of the whole investigation into the truth of the affirmative hypothesis proposed, on a criminal trial, has already been shown to be *probability*. Until an impression of the probability of this hypothesis be produced upon the minds of the jury, no presumption of guilt can begin to be distinctly formed. This probability or presumption, (for the terms seem to be nearly convertible) is usually and very properly considered as compounded of the several concurring probabilities or presumptions derived from each separate fact shown in evidence. (*a*) Hence the greater the number of independent concurring facts proved, the greater the consequent aggregate probability of the truth of the fact sought. The effect of mere *number* on the probative force of independent circumstances, has already been considered. As to the effect of a combination of concurring facts or probabilities, more will be said in another place.

The foundation of probability, as deducible from any single evidentiary fact, is its perceived agreement or *coincidence* with the supposition of the truth of the fact sought. The term "coincidence" very aptly expresses the particular idea usually conveyed by it ; (*b*) and is constantly and prominently used by the best writers on presumptive evidence. The nature and effect of coincidences, therefore, next occur as subjects of illustration.

Coincidences are of two kinds ; *physical*, otherwise called

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(*a*) 1 Stark. Evid. 497, and note.

(*b*) A falling together upon one point : a meeting in one point, (Lat. *coincidere*.)

mechanical, which are the objects of sense ; and *moral* ; (a) answering to a leading division, already noticed, of facts or circumstances themselves. (b) The circumstance that impressions made by human feet upon earth or snow, at a certain place, correspond accurately with the feet of an accused party, is a physical coincidence. (c) The connection between the acts and motives of a party is a moral coincidence. (d) The ultimate point or object of coincidence is, undoubtedly, the hypothesis of guilt proposed to be proved. But there is also an intermediate coincidence, of which the elements of evidence themselves are the subjects. There is a coincidence between one evidentiary fact and another, as well as between either of them and the ultimate fact or hypothesis. Indeed, the latter is rather an argumentative conclusion from the former, which is always first established. Some examples of these particular coincidences, with their effects, will now be given.

A person, while attending a fair, is robbed of a purse, containing precisely seven sovereigns. Another person is apprehended at the same fair, in whose possession is found a purse containing precisely the same number of coins of the same kind. This is a coincidence of the physical kind. (e) A person receives a letter, over a feigned signature, containing a demand, and a threat against his life, if such demand is not acceded to ; and appointing a particular day and hour and a particular place, (a certain tree near a park mentioned,) as a time and place of meeting. He accordingly repairs to the spot indicated, at the time appointed, and

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(a) 1 Stark. Evid. 484, 485. 8 Phill. Evid. (Cowen & Hill's notes) Note 288. 1 Greenl. Evid. § 11. Shaw, C. J. in *Commonwealth v. Webster*, Bemis' Report, 465.

(b) *Ante*, p. 129.

(c) Shaw, C. J. in *Commonwealth v. Webster*, *ubi supra*.

(d) *Id. ibid.* 1 Stark. Evid. 491, 492. See further on this subject, *post*, Part II.

(e) See the example, presenting additional coincidences, *infra*.

there meets a person. (a) Here is another coincidence, essentially physical, although a person is the subject of it. A piece of cloth is cut out of a loom and stolen. A person is arrested, with a similar piece of cloth in his possession, one of the ends of which is found to have been cut; and the edge thus left, on being compared with the cut edge of the remnant left in the loom, is discovered to fit it exactly. (b) Here is a mechanical coincidence. The correspondence, which is the essence of coincidence in these cases, is ascertained, or made to appear by the process of *comparison*, which is either mental, as in the two first examples, or actual and mechanical, as in the last. The immediate object of such comparison is identification; and this object is attained in a more or less satisfactory degree, according to the case. The fact of the loss of a certain description of money in a particular place, being mentally compared with the fact of finding the same description of money in another's possession, in the same place, induces an impression, that it is the *same* money. But, although both facts be fully proved, the resulting coincidence will, as we shall see, be far from proof of identity. The fact of meeting a person at a particular spot, compared with the fact that that very spot has been indicated in a private letter previously received, creates an impression that such person was either the writer of the letter or some one sent by him. But in this instance, also, the coincidence falls far short of proof. The piece of cloth cut from the loom, being compared (by actual application and adjustment,) with the remnant of cloth left in it, and found to correspond in every particular, creates a belief that the piece cut out and the piece applied,—the piece stolen and the piece found, are one and the same. In this last case, indeed, the belief may be so strong as to amount, in itself, to proof: for a reason which will be explained farther on.

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(a) See the example, presenting additional coincidences, *infra*.

(b) 1 Stark. Evid. 497, 499, note.

The force and effect of coincidence, in its general result, always depends upon the number, exactness and concurrence of the several particular coincidences proved. A single coincidence, however perfect in itself, is seldom or never sufficient as proof. Thus, in the first of the above examples, the two facts of seven sovereigns lost by one person and seven sovereigns found in the possession of another, though coincident, are perfectly consistent with the innocence of the person in whose possession the coins are discovered. It is possible, and, in a large assemblage of persons, not improbable, that two and even more individuals might have in their purses identically the same number of pieces of coin, of the same denominations. But, suppose the fact to be, that the money lost or taken from the purse of the one individual consisted of the following varieties in combination:—one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns, and seven sovereigns; (a)—and that the money found in the purse of the other, consisted of precisely the same combination of coins. Here is a coincidence, composed of seven minor and exact concurring coincidences; increasing, to a very high degree, the probability of the supposition that the coins lost or taken and those found are identically the same; and rendering proportionately improbable the supposition of an accidental coincidence, and a consequently innocent possession. Indeed, on the latter supposition, the coincidence would be most extraordinary; and yet, in the absence of the actual proof of the identity of any part of the money, and of any other circumstance operating against the accused, it would not amount to legal proof. (b) The reason given is, that the probability, in this case, however high, is one of a definite and inconclusive nature. (c) “The probability,” observes a learned writer,

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(a) This is a hypothetical case, put by Mr. *Starkie*, in illustration of the point under consideration. 1 *Stark. Evid.* 497, 499, note.

(b) *Id. ibid.*

(c) *Id. Ibid.*



“ that the coins lost and those discovered are the same, is so great, that, perhaps, the first impulse of every person unaccustomed to this kind of reasoning, is unhesitatingly to conclude that they certainly are so ; yet, nevertheless, the case is one of probability only, the degree of which is capable of exact calculation ; but if that degree of probability, high as it is, were sufficient to warrant conviction in the particular case, it would be impossible to draw the distinction between the degree of probability which would, and that which would not justify the infliction of penal retribution, in other cases of inferior probability. In the case of a small number of coins, two or three for instance, the probability of their identity would be very weak ; and yet the two cases, though different in degree, are, in principle, the same ; and the chance of identity is, in both cases, equally capable of precise determination.” (a) The same writer, however, adds, that “ it would be difficult to resist the inference of the identity of the coins, if, in the case supposed, they were scarce or foreign ones.” (b) What number of mechanical coincidences may amount to proof, will be considered on a subsequent page.

To take the next example, above given. Supposing that the person met near the tree mentioned, on being accosted by the other, (who gives his name) and asked if he had any thing to say to him, answers in the negative,— the conclusion would be, that he was not the person expected, and that the meeting was accidental ; and this contingency could not, in itself, be pronounced other than possible, even at the particular spot indicated ; especially if it was in a place accessible to, or actually frequented by numbers of persons. But supposing that, a few days after, a second letter, pursuing the tone of the first, and written in a similar hand, is received by the person previously addressed ; in which the writer, after virtually acknowledging that a meet-

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(a) Wills on Circ. Evid. 215.

(b) *Id. ibid.*

ing *had taken place*, (which, however, failed, for a reason given,) appoints another place of meeting, namely, a particular aisle of a particular church, at a particular hour and day named; and that the person addressed, on repairing to this second place, finds there *the same person* whom he had seen and accosted before,—here is, with a small increase of facts, a large increase of probabilities. First, there is the admission of the fact of the first meeting, taking from it its character of fortuitousness, and showing or tending to show the person met to have been the writer of both the letters. Secondly, independently of this, there is the increased improbability that the same person should, by mere accident, have been met at *two* different places privately designated by another. Now, supposing the person, thus twice met, on being accosted and inquired of, as on the former occasion, replies, as before, that he had nothing to say,—a possibility that he was not the writer still remains, resting on the following infirmative suppositions. As the character of the first place indicated, admitted of the presence of *several* persons, it might have been that the real writer of both letters was in the vicinity, near enough to have witnessed and understood the interview between the other two. The character of the second place appointed might also clearly admit of the presence of *several*. But, supposing, after all these occurrences, that a *third* letter is received, in which the writer *alludes to the second interview*, and its failure; and repeats the threats conveyed in the first letter, without, however, appointing any new place of meeting,—the probability that the person twice seen and spoken with, was the writer of all the letters, or concerned in, or privy to the writing of them, or, at least, in some way connected with the transaction, becomes now so strong as to satisfy almost any reasonable mind of the fact. And yet, without other corroborative evidence, even these extraordinary coincidences would not be regarded as a sufficient

ground of convicting the accused, especially in a capital case. (a)

Moral coincidences are correspondences between the conduct of a party accused of crime, and the supposition of his guilt, or certain facts indicative of his guilt. Of this description are,—the previous existence of an adequate motive, on his part, to commit the crime; acts of preparation by him, before its commission; his subsequent conduct in refusing to explain appearances or circumstances obviously tending to criminate him; and his own voluntary admissions or confessions in regard to the transaction. The great value of such coincidences consists in the closeness with which they connect the crime with the criminal, and in their general freedom from liability to the infirmative suppositions of fortuitousness or accident.

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(a) 1 Stark. Evid. 507, note. The facts stated in the text, in the way of supposition, were, together with others equally strange, the actual facts, in the very remarkable case of *William Barnard*, who was tried at the Old-Bailey, in 1758, for sending a threatening letter to the Duke of Marlborough. The Duke received three letters, written in an atrocious strain of threat, (the first being signed with the name of the assassin *Felton*, and demanding a genteel support for life,) and desiring to detect the writer, with a view to punishment, had two interviews with a person, in consequence, as stated in the text. He finally received a fourth letter, signed "Anonymous," and apparently from a different source, advising him to have an interview with *Barnard* (whose address it gave,) and who was acquainted, it stated, with some secrets that nearly concerned his safety. On sending for *Barnard*, the Duke found that *he was the person* whom he had so repeatedly met! The defence set up, on the trial, was, that the meetings were *accidental*, and upon evidence of this, corroborated by evidence of character, the prisoner was acquitted. It is difficult to resist the conviction, however, that he actually was a party to the transaction; though the real intention of the writer may have been different from that conveyed by the letters; and this appears to be Mr. *Starkie's* solution of the case. See the report of the trial, in 19 Howell's State Trials 815; and in Burke's Trials connected with the Aristocracy. 228. Another singular coincidence mentioned in the work last cited, remains to be stated. In the first letter, the writer threatened that in case of the Duke's refusal to comply with his request, his life would be at a period before the session of parliament should be over. The Duke died before the session expired.

Coincidences of a merely physical or mechanical kind are usually ranked, in point of probative efficacy, below those of a moral nature; (*a*) or rather, they are held to require some intermixture of the latter, to give them the efficacy desired in a body of evidence. (*b*) That mere number, however, may give to purely mechanical coincidences, conclusive force as proof, may be illustrated by the last example given on a previous page. (*c*) The coincidence between the cut edges of two pieces of cloth, (supposed to have previously constituted one piece,) is composed of the separate coincidences of each thread of the one, with each corresponding thread of the other. Here, the resulting probability that the two pieces have been one, or that the piece applied to the remnant in the loom, is the identical piece which had been cut off from it, and stolen, is said to exceed the bounds of arithmetical calculation; and to deprive the mind of all power of attributing such a series of coincidences, to mere accident. (*d*)

The peculiar force of circumstantial evidence, as a medium of judicial proof, consists in the union of what may be called its *affirmative* and *negative* qualities, answering to the two stages in the process of presumption, before considered: its affirmative or positive force consisting in its power of *raising* a presumption of guilt, by indicating the affirmative hypothesis, or fact sought, as the probable and therefore the true one; its negative or exclusive force consisting in its power of *trying* such presumption, by demonstrating that no other hypothesis can be the truth.

The great principle of its force, considered in an affirma-

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(*a*) 1 Stark. Evid. 487, 497.

(*b*) *Id. ibid.* 501.

(*c*) *Ante*, p. 170.

(*d*) 1 Stark. Evid. 497, 500, note. The circumstances constituting coincidences of both kinds will be considered in detail in the second part of this work.

tive point of view, is the *concurrence of several* distinct circumstances in their indication of one and the same ultimate fact; or the concurrence of several presumptions raised from such circumstances, constituting one single general presumption of the truth of such fact. (a) This concurrence, with its consequent effect, has been expressed by a variety of figures, but by none more aptly than that of a convergence of rays of light to a common focus or centre. (b) The whole process of investigating truth by circumstances is, most emphatically, a process of shedding light upon darkness. The circumstances (to speak of them in their literal import) *stand around* the principal fact, which, until they are presented and placed in this relative position, often lies wholly in the shade; and it is by the combined light which they throw upon it, each contributing its share, that the object

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(a) A writer in the London Law Magazine, who has been occasionally quoted in the preceding pages, has taken some pains to prove this view of the operation of circumstantial evidence, which is prominently maintained by the best writers, to be radically erroneous. Without adverting to the *two-fold* character of the process, as indicated in the text, he assumes that the entire process by which the evidence is applied, is considered as one of *strict argument*, looking to an immediate result as proof. "This man is a murderer, *because* he had blood on his clothes, and murderers have blood on their clothes," &c. He very properly pronounces such an argument to be illogical or inconclusive, and maintains that no assignable number of illogical arguments can (that is, by their mere union,) logically prove any thing. 6 Lond. Law Mag. 360. But he has obviously mistaken or mis-stated the process which is always actually employed where the evidence is properly presumptive. It is not strictly logical argument, looking to absolute proof as its immediate object. The syllogistic form of reasoning is never made use of, at least in the preliminary stage of raising a presumption from facts. It is reasoning of the presumptive kind, as it has been repeatedly explained, applied by a process of comparison, and resulting in an impression of likeness, verisimilitude or probability, to be *afterwards* confirmed to the strength of moral certainty, by the test of counter-hypotheses. While, therefore, it is conceded that arguments in strict form, if illogical, gain no force by being *accumulated* to any extent, it is equally clear that it is of the essence of probability to acquire strength indefinitely, by this very process. See Butler's Analogy, Introd.

(b) Wills on Circ. Evid. 214.

sought is revealed to view. It is this concurrence or united bearing, which gives to the circumstances proved their great efficacy as evidence. Without it, the force of facts, individually considerable, may be neutralized and destroyed; with it, aided by number and independence, facts, individually of slight significance, may become conclusive.

It has been said, however, that the mere concurrence of even numerous circumstances, or their resulting probabilities or coincidences, will not answer the purpose of proof, in criminal cases, unless some of such circumstances or probabilities be, in themselves, of a conclusive nature; or unless the number of the coincidences is so great as to exceed all definite limits. "It seems," observes Mr. *Starkie*, "that, in criminal cases, the mere union of a limited number of independent circumstances, each of which is of an imperfect and inconclusive nature, cannot afford a just ground for conviction." (a) The terms "conclusive" and "inconclusive," it may be observed, are used by this writer in a somewhat peculiar sense, as indicating the comparative effect of *moral* and *physical* coincidences. (b) What is meant in the passage last quoted, seems therefore to be, that no concurrence of any limited number of merely *physical* coincidences, unmixed with those of a moral kind, can be adequate to the purpose of conviction. Further than this, its meaning cannot be extended. (c) For it is obviously possible, and frequently the case, that, in the words of Mr. *Best*, "a number of circumstances, each individually very slight, may so tally

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(a) 1 Stark. Evid. 500, 501.

(b) *Id.* 487, 497, 501.

(c) The passage from *Starkie*, quoted in the text, seems to have been the one had in view by the court, in charging the jury in the case of *The State v. McCann*. But it is given with a proper and very important qualification. "In criminal cases, the mere union of a number of independent circumstances, each of which is inconclusive in its nature and tendency, cannot afford a just ground for conviction, *unless the combination is conclusive.*" 18 Smedes & Marsh. 499. And see 3 Phill. Evid. (Cowen & Hill's notes,) Note 288, p. 475.

and confirm each other, as to leave no room for doubt of the fact they tend to establish." (a) Or, in the more emphatic language of Mr. *Bentham*, "even two articles of circumstantial evidence,—though each taken by itself, weigh but as a feather,—join them together, and you will find them pressing on the delinquent with the weight of a millstone." (b) This language, like the figure employed, may perhaps be considered extravagant; but the principle indicated is, doubtless, the true one: *Juncta juvant*. (c)

The circumstances of a case, then, when proved and found to be uniformly concurrent, in the sense which has been explained, are to be *taken together*, considered in combination, and finally passed upon *in that form*. (d) This is a mental process consequent upon the ascertainment of the character of the facts themselves, and, indeed, demanded

(a) Best on Pres. § 188. And see Beccaria on Crimes, chap. 14.

(b) 8 Benth. Jud. Evid. 242.

(c) The civilians have compared the effect of this union of slight circumstances to the overwhelming pressure of a storm of hail. *Quæ singula non nocerent, ea universa, tanquam grando, reum opprimant*. Matthæus de Crim. lib. 48, Dig. tit. 15, de Probationibus, p. 675. *Carpzovius* remarks that one presumption aids another, and a multitude of circumstances united, produce belief, or make proof. Quæst. 223, num. 57. The principle is admitted by Mr. *Starkie* himself, in its application to witnesses. "Where it is once established," he observes, "that the witnesses to a transaction are not acting in concert, then, *although individually, they should be unworthy of credit*, yet if the coincidences in their testimony be too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement." 1 Stark. Evid. 466.

(d) See the observations of *Shaw*, C. J. in *Commonwealth v. Webster*, Bemis' Report, 465. "It seems to be of the greatest importance," says *Butler*, "that the proof of revelation is, not some direct and express things only, but a great variety of circumstantial things also; and that though each of these direct and circumstantial things is indeed to be considered separately, yet they are afterwards *to be joined together*; for that the proper force of the evidence consists in the results of those several things, considered in their respects to *each other*, and *united into one view*." Analogy, part 2, chap. 7. And again, "the truth of our religion, like the truth of common matters, is to be judged of by all the evidence *taken together*." *Id. ibid.*

by it. For, as the original facts constituted the case which actually occurred, by means of their *connection*, it is obvious that the case cannot be re-constructed out of the facts proved, (which is always necessary, in order to make it a subject of intelligent consideration) or, in other words, that no rational view or theory of it, as a whole, can be formed without a similar process. This process has, as was just observed, been illustrated by a variety of figures. It has been compared to the construction of an arch out of a number of separate stones; to the weaving of a rope or cable out of a number of separate filaments; (*a*) and to the formation of a chain out of a number of separate links. (*b*) The last figure is the one most frequently employed, and it expresses with great aptness and force, as well as simplicity, the chief characteristic of the whole procedure,—connection in a logical series, with a reference throughout to historical order. The great object with which criminative evidence is presented to a jury, is always to form such a *chain*, in which each circumstance or link shall be in its proper place; and all, taken together, shall connect the crime with the criminal in the most effectual and satisfactory manner.

Again, the circumstances are not only to be combined, but *held* in combination, and so passed upon. They are not to be separated from each other, merely for the purpose of examining and weighing the force of each, apart from the rest. This method of argument is, indeed, often resorted to, in practice, with a view to destroy the effect of a mass of criminative evidence otherwise unassailable. But to attempt to test the force of a body of evidence by this means, would be as rational as to test the strength of an arch, by taking it to pieces, and passing on the force of

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(*a*) Wills on Circ. Evid. 214: citing Reid's Essay on the Intellectual Powers, chap. 8. Clifford, Attorney General, *arg.* in *Commonwealth v. Webster*, Bemis' Report, 897.

(*b*) Best on Pres. §§ 187, 188.



each individual stone ; or the strength of a cable, by untwisting it into its component filaments, and demonstrating the weakness of each, by snapping it separately asunder. The chain of facts, once constructed, is not to be broken up, with the mere view of showing the separate insufficiency of each link composing it ; and thence inferring the insufficiency of the whole as connected. (a) It is true that it always may be assailed with the simple view of breaking it, and thus destroying the *continuity* which constitutes its chief value ; and this expedient is constantly resorted to, in practice, by advocates for prisoners, and often with distinguished success. But in this procedure, it is not so much the elementary facts themselves which are assailed, as the *connection* which they are claimed to form. Where two facts or groups of facts, in a chain, are seen to be inconsistent with each other, and so not capable of connection, or where a link, though ever so small, is palpably wanting, or only seemingly present, or, if present, improperly so ; or is obviously too weak to answer the purpose of connection ; a point of attack is offered which may always be legitimately taken advantage of.

The process of *analysis* is doubtless always an important and a necessary one ; and is constantly called into exercise in trials for crimes. It serves to test the relevancy and bearing of each particular fact, to determine its consistency with the rest, and to give it its proper individual significance. But it is, in its nature, so far as the jury are concerned, merely a preparatory one to the more important process of combination ; without which, indeed, the whole investigation would be left without an aim. It is a *sifting* of the materials of *construction*, to ascertain whether they properly *belong* to the case, and are capable, by means of their con-

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(a) See the observations of Mr. *Bentham*, 8 Jud. Evid. 280, 282. And see the observations of the Solicitor General, in the case of *John Barbot*, 18 Howell's State Trials, 1802.

sistency, of being united into one body. Force, weight and efficacy are, unquestionably, indispensable considerations to the formation of any satisfactory conclusion from circumstances. But they are final, rather than intermediate considerations; applicable to the evidence as a body, and not to its constituent elements.

Having thus considered the force of circumstantial evidence, in a positive or affirmative point of view, as exemplified in the process of *raising* a presumption from facts, on the basis of probability; it remains, in the next place, to consider it with reference to its negative or exclusive efficacy, by which it finally *proves* the presumption raised, to be the true one, by negating or excluding every other: and this is a point of view which never can be overlooked or dispensed with.

Supposing then, that, by a course of examination, combination and inference, such as has already been described, the jury have reached the point of forming an affirmative belief of the probability, and strong probability of the hypothesis of guilt; their task is not yet completed. A great and final *test* of the accuracy of the conclusion they are thus led to form, remains to be applied; in which the entire and peculiar efficacy of circumstantial evidence is said to consist; (a) its application constituting the second stage in the general process of presumption employed in the case. This test is the *negative* point of view, just mentioned. It is not sufficient that the circumstances proved, coincide with, account for, and therefore render probable the hypothesis sought to be established; but *they must exclude, to a moral certainty, (b) every other hypothesis but that single one. (c)*

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(a) Wills, Circ. Evid. 17. 6 Lond. Law Mag. 364, note.

(b) 1 Stark. Evid. 482, 483. See further, *post*, in this section.

(c) Best on Pres. § 210. Wills, Circ. Evid. 149. 1 Stark. Evid. 510. 1 Phill. Evid. 488. 8 *Id.* (Cowen & Hill's notes) Note 288. 1 Greenl. Evid. § 18, a.

The object of this rule is to guard against the consequences of haste and want of circumspection, and to combat the tendency of the mind to take a one-sided view of facts, when under the influence of a few powerful impressions. The law, in its solicitude for the protection of individual rights, under the most adverse circumstances, has established the presumption or rule, already adverted to, that *every person is to be supposed innocent, until actually proved to be guilty*. This great fundamental presumption it holds conspicuously before the jury, during the whole course of their investigation; and demands that it shall not be abandoned, so long as any reasonable probability of its truth remains.

The hypothesis of guilt, in its most comprehensive sense, we have seen to be the general proposition offered for proof, on the part of the prosecution, that the accused is guilty of the crime charged; being the affirmative branch of the issue before the jury, and the principal fact, or *factum probandum*, of the case. Spread out into particulars, this hypothesis or proposition takes the form of a connected statement of the leading facts of the case, as they are supposed to have occurred; constituting what is often called the *theory* of the case on the part of the prosecution. It is to sustain this single theory, in its necessary details, that the facts proved are framed into that particular combination already described as a chain of evidence.

Supposing this chain to be so far perfect, that it cannot be directly assailed on the part of the accused, by showing the proof to be inadequate for the purpose of conviction; its force may frequently be evaded by taking the ground that the facts proved do not necessarily or exclusively lead to, or require the adoption of the theory claimed to be made out, but that they may reasonably admit of *another* solution or explanation, consistently with the idea, supposition or belief, that the prisoner is innocent. Such an explanation, given in detail, or in outline, presents what is called the

particular hypothesis or "theory" of the case, on the part of the prisoner; and it sometimes happens, in certain combinations of facts, that a case will admit of *several* of these counter or rival hypotheses, as they have been termed. These hypotheses are usually presented and urged by the prisoner's counsel in his closing address to the jury; and they are rested sometimes solely on the prosecutor's facts, and sometimes upon these, as modified by facts shown in opposition. In some cases, they are of such a nature as to occur to the jury themselves, as mere supposable facts of which no evidence has been given. But in whatever way presented, if the case appear reasonably to admit of them, they should always be examined by the jury, and applied as tests of the correctness of the conclusion which they are about to form. As they all purport to be founded upon the general supposition of the prisoner's innocence, they must all be satisfactorily disposed of, and excluded from the case, before that supposition can with safety be abandoned.

These particular negative or infirmative hypotheses are all reducible to two:—first, there has been *no criminal* agency in the case; secondly, admitting a criminal agency to be proved, the agent has been *some other person* than the prisoner at the bar. (a) The former of these involves the sufficiency of the proof of a *corpus delicti*, which has already been generally remarked upon; (b) and it may be illustrated by the explanations or solutions which have been offered by some able writers, of the famous example of violent presumption given by Lord *Coke*. A man is found dead in a house, having been run through with a sword; another man is seen coming out of that house, with a bloody sword; and

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(a) These are the two leading positions, constantly assumed in practice, for the defence; corresponding with and intended to meet the two general consecutive points which are always to be made out by the prosecutor; namely, that a crime has been committed, and that the prisoner is the person who committed it.

(b) See *ant.*, p. 119.

no other person was at the time, in the house. The man with the sword is arrested, and put on trial for murder. Now, instead of concluding, with Lord *Coke*, (a) Chief Baron *Gilbert*, (b) and others, (c) that the facts of the case conclusively prove the accused to have been the murderer of the other, it has been said that they may be explained, consistently with the idea or supposition of his innocence, upon either of the two following hypotheses; both proceeding on the ground that no murder at all has been committed. First, the facts may have been, that the deceased committed suicide, by plunging the sword into his own body; and that the accused being present, and not being in time to prevent the act, drew out the sword, and ran out with it, through confusion of mind, for surgical assistance. Or, secondly, the facts may have been, that, the deceased and accused both wearing swords, the deceased in a fit of passion attacked the accused; and the latter, being close to the wall and having no retreat, had just time to draw his own sword, in the hope of keeping the other off; but the deceased, not seeing the sword in time, ran upon it, and so was killed. (d)

Of the second class of infirmative hypotheses,—those, namely, which proceed on the ground that *some other person* than the accused has committed the crime charged,—the following may be taken as an illustration. A person has been found murdered in a dwelling-house inhabited by no one besides the deceased and the prisoner. The circumstances strongly indicated that no other person could have been in the house, at the time of the murder, except these two: no person had been seen or heard to enter from with-

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(a) Co. Litt. 6 b. See *ante*, p. 61.

(b) 1 Gilb. Evid. 157.

(c) 2 Hawk. P. C. c. 46, s. 42. 1 Stark. Evid. 483, 484, note. Roscoe's Crim. Evid. 14.

(d) See 3 Benth. Jud. Evid. 236, 237; quoted, substantially, by Mr. Best. Best on Pres. § 80.

out; the doors and windows, through which an entry would naturally be made, were found closed and secure as usual, and upon none of them, nor upon the ground about the house, were the slightest traces of any entry found. The house stood alone, but it stood in a narrow street, with houses upon the opposite side. Such a case was tried, not long ago, in England. (a) Here the facts proved, although not numerous, were strongly criminative, (b) consistent with the guilt of the prisoner, and, taken together, reasonably indicated the hypothesis of that fact to be the natural and probable, and therefore the true one. Now, as a particular exculpatory hypothesis, it was possible that an entry might have been effected by some person, other than the prisoner, from one of the *opposite* buildings, by thrusting a board *across the street*, from an upper window to an upper (and unsecured) window of the house in question. It is not known whether such an hypothesis was actually suggested on the trial; but had it been, it was so far out of the range of ordinary probabilities, that little weight would probably have been attached to it. And yet it turned out to be *the actual and only truth of the case*, (c) although too late to save the prisoner, who was executed upon the strength of evidence which, doubtless, was regarded, at the time, as abundantly sufficient to warrant conviction. This was a striking example of the deplorable consequences of neglecting to notice *every* hypothesis favorable to a party accused, which the facts of a case will admit.

The foregoing are examples of negative or infirmative

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(a) This case is referred to by Mr. *Starkie*, in a very general way, as taken from "common report," and occurring "some years before" his work on Evidence was written. 1 Stark. Evid. 518, note.

(b) There were some other circumstances in the case, but of a less important character. *Id. ibid.*

(c) The real murderers, on being afterwards apprehended, confessed that they had entered and left the house by the upper window, in the way mentioned. 1 Stark. Evid. *ubi supra*.

hypotheses, which *might have been* opposed to the hypothesis or theory of the prisoner's guilt, in the cases stated. An example of similar hypotheses, *actually* proposed and strenuously maintained on the trial, was furnished in the late American case of *Commonwealth v. Webster*. The hypothesis or theory, on the part of the prosecution, in that case, was that the deceased, between two certain hours of a day specified, entered the chemical lecture-rooms in the Massachusetts Medical College, occupied by the prisoner, and then and there had an interview with him; that he never withdrew from those rooms, or left that building alive; that the parties never separated; but that the deceased was there slain, and the remains of his body disposed of, and kept concealed by the prisoner, in the building, until their discovery during the week ensuing. (a) To meet this, there were various propositions, views or theories advanced for the prisoner; but the hypothesis formally presented and principally relied on, in his behalf, was,—that the deceased was killed, after leaving the building, by some person unknown, and his body carried into the apartments of the prisoner, where it was disposed of and concealed. (b)

The infirmative or counter hypotheses which have just been described are identical in character with the infirmative suppositions considered on a previous page; (c) only, they are reserved to a later stage of the investigation; or rather, they are applied to the facts taken collectively, after all the evidence has been presented, and not to each fact as it is separately proved. They are applied on a principle analogous to that observed in geometrical demonstrations, in which, out of a number of hypotheses supposed, one after another is examined and shown to be absurd, and therefore rejected; leaving only the original solution, the sufficiency

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(a) See Bemis' Report of the trial, 287, 288.

(b) *Id.* 338, 339, 346, 361, 371.

(c) See *ante*, p.p. 153, 154.

of which has already been affirmatively proved, and is now, by this reverse process of negation or exclusion of all others, conclusively established. (a)

The great object, then, of the jury, at this stage of the trial, should be to possess themselves of *all* the negative or counter-hypotheses of which the case will reasonably admit. The deplorable consequences of overlooking a single one, have been illustrated by one of the examples just given. "It is essential," observes Mr. *Starkie*, "to inquire, with the most scrupulous attention, what other hypotheses [besides the affirmative one,] there may be, which may agree, wholly or partially, with the facts in evidence. Those which agree, even partially, with the circumstances, are not unworthy of examination, because they lead to a more minute examination of those facts, with which, at first, they might appear to be inconsistent; and it is possible that, upon a more minute investigation of those facts, their authenticity may be rendered doubtful, or may be even altogether disproved. In criminal cases, the statement made by the accused is, in this point of view, of the most essential importance. Such is the complexity of human affairs, so infinite the combinations of circumstances, that the true hypothesis which is capable of explaining and reconciling all the apparently conflicting circumstances of the case, may escape the acutest penetration; but the prisoner, so far as he alone is concerned, can always afford a clue to them; and though he be unable to support his statement by evidence, his account of the transaction is, for this purpose, always most material and important. The effect may be, on the one hand, to suggest a view of the case which consists with the

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(a) 1 Stark. Evid. 481, note. The Roman law does not seem to have provided any test of this particular kind. But, in lieu of this, it required the positive impression or assurance of guilt to be of the very highest degree of strength conceivable; and to express this degree, it made use of an extravagant figure,—the proof must be *clearer than light*, (*luce clarioribus*.) Cod. 4, 19, 25.



innocence of the accused, and which might otherwise have escaped observation; on the other hand, its effect may be to narrow the question to the consideration whether that statement be or be not excluded and falsified by the evidence.”(a)

Having possessed themselves of all these counter-hypotheses which the most diligent inquiry and reflection can afford, the next step, on the part of the jury, and the most important one in the whole trial, is to dispose of them satisfactorily; it being an invariable rule that they must all be excluded from the case, before the affirmative hypothesis, however otherwise clear, can be safely adopted. The great object of all evidence being to establish truth, which, in its nature, is single and exclusive, so long as the evidence leaves it *indifferent* which of several hypotheses is true, it can never amount to proof of the principal fact sought.

The process by which these hypotheses are disposed of, may now be more particularly considered. Before they can be admitted to any efficient influence as tests of the sufficiency of the affirmative hypothesis, they must themselves appear to be possessed of a determinate quality. In other words, they must themselves be *tested*, and this is done by employing the same process and applying the same standard, as those by which the affirmative hypothesis itself was presumptively established. They must be *compared with the facts* of the case as shown in evidence. The inquiry in regard to each separate hypothesis, as it is taken up for examination, must always be,—“Does it consist with, or account for these facts, and to what extent?”

If it appear that it accounts for the facts with greater reason than the affirmative hypothesis, the result is obvious,—the latter must be abandoned. If it account for them with equal reason, the same effect is produced, an equilibrium of judgment being the consequence. And if it

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(a) 1 Stark. Evid. 512.

account for them so far as to render it probable, against only a greater probability on the affirmative side, the result must be the same ; mere probability, as we have seen, never constituting a sufficient basis of conviction. (a)

If, on the other hand, the hypothesis under examination be obviously inconsistent with the facts in evidence, or the great mass of them, or with any clearly ascertained facts of a leading character ; or if it utterly fail to account for them, or leave them without any reasonable significance ; it cannot be allowed to prevail against an affirmative hypothesis which has already answered and satisfied all these conditions. In such a case, the circumstances or facts are said to *exclude* the hypothesis under consideration ; and upon the same principle, one after another, (where there are several,) is examined and rejected, until the only reasonable hypothesis left in the case is the affirmative one, which has already been preliminarily or presumptively established. (b) In such an event, no alternative remains but to adopt that hypothesis, and consequently to convict the prisoner.

In order to exclude a counter or infirmative hypothesis, it is not sufficient that it appear in itself, or in the abstract, improbable. That a person, intending to enter a house for a criminal purpose, should adopt the expedient of thrusting a board across a street, from the upper window of another house, might perhaps appear in itself improbable, although even more improbable modes of entry than this, have sometimes been found to consist with actual fact. The great test is the one just mentioned ; it must fail to account for the fundamental criminative facts. In the case of the entry of the house, in the example before given, the hypothesis of

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(a) And see 1 Stark. Evid. 506, 507.

(b) Hypothetical reasonings are susceptible of the highest degree of evidence when the given [affirmative] hypothesis explains many phenomena, and contradicts none ; and when every other hypothesis is inconsistent with some of the phenomena Theory of Presumptive Proof, 21.

an entry in the way just mentioned, would have borne this test; it would have accounted, in the most perfect manner, for the absence of all marks of fracture or entry upon the doors and windows examined, as well as for the absence of all traces of footsteps on the ground outside of the house. In the case of the *Commonwealth v. Webster*, the hypothesis urged in behalf of the prisoner, was, in itself, in a high degree improbable, although based on facts claimed to have been actually proved; namely, that the parties separated after the interview had between them, and that the apartments where the remains were found, were accessible to other persons besides their ordinary occupant. (a) But, in addition to intrinsic improbability, it failed to account for the great mass of the affirmative facts, or, at least, to account for them with any thing like the accuracy and fullness of the affirmative hypothesis; and its actual falsity throughout was subsequently proved by the confession of the accused himself. In connection with this case, the following passage from a well-known writer on evidence, has a very appropriate application. "In a criminal case, where all the circumstances of time, place, motive, means, opportunity and conduct concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of any other agent; although, had any other existed, he must have been connected with the perpetration of the crime, by motive, means and opportunity, and by circumstances necessarily accompanying such acts, which usually leave manifest traces behind them." (b)

But while it is not sufficient ground for the rejection of a counter-hypothesis, that it is merely improbable, either in the abstract, or in the light of the facts proved; it is not, on the other hand, necessary to its exclusion, that it should be seen to be absolutely impossible. If its truth be rendered,

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(a) Bemis' Report, 388.

(b) 1 Stark. Evid. 494, 495.

on the principles of reason and experience, exceedingly remote and improbable, and morally, though not absolutely impossible, it will be sufficient to exclude it in favor of the affirmative hypothesis. (a) But it must, at least, be reduced within the limits of physical possibility. (b)

As the facts of the case, then, constitute the great standard by which the hypotheses on both sides are to be tried, the importance, (often already adverted to,) of being possessed of all the facts, and of contemplating them in all reasonable lights and connections, becomes more than ever apparent. If these conditions are attained, the process of disposing of whatever counter-hypotheses may present themselves, becomes a short and easy one. In the case of the man run through with a sword, given, in the way of example, by Lord *Coke*, a single fact showing the nature and direction of the wound, or showing the existence of several wounds on the body, might, of itself, at once exclude both the hypotheses proposed. Again, where the facts are numerous, and the connections established by them proportionately so, a similar effect will be produced. The case of *Rex v. Richardson*, which will be given in a subsequent chapter, was of this character. In that case, the circumstances were numerous and varied, and the coincidences founded upon them, minute, multiplied and thoroughly accordant, fixing the charge of guilt on the accused, in the clearest manner. Hence the hypothesis set up in his behalf,—that a boat's crew, proved to have landed at a place not far from the scene of the crime, might have been the perpetrators of the murder,—was seen at once to be wholly untenable. It would not account for the facts proved. To have allowed it weight enough to raise a doubt in the minds of the jury, would have been attended with the absurd result of destroying the significance of every fact accumulated in that remarkable mass

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(a) 1 Stark. Evid. 482.

(b) Best on Pres. § 195.

of evidence, which was afterwards signally confirmed as the truth by the prisoner's own confession.

It has been well said that "a few circumstances may be consistent with several solutions, but the whole context of circumstances can consist with one hypothesis only; and the wider the range of circumstances is, the more certain will it be that the hypothesis which consists with, and reconciles them all, is the true one." (a) It would be extraordinary indeed, if the same body of genuine and consistent facts could give rise to, and support, with any show of reason, two hypotheses involving radically different, if not diametrically opposite, conclusions.

The great advantage and constant effect of entertaining in the mind, for however short a period, all possible hypotheses in opposition to one already provisionally established, however improbable they may individually be, and even though no evidence whatever has been adduced in their support, are—that it effectually checks precipitancy, and secures, to the utmost attainable degree, the thorough examination of the essential grounds upon which the verdict is to rest. It leads the jury to review and scrutinize, sometimes repeatedly, the whole evidence before them; to satisfy themselves as to the facts proved, and the connections which they have been supposed to form; to contemplate them in every reasonable point of view; to reconsider, under new lights, their previous inferences; and to test the sufficiency of the entire chain of evidence by forces applied at every possible point. Tried by so searching a process as this, the belief of the truth of the hypothesis of guilt, if it still continue to prevail in their minds, may well be relied on as possessing the quality—indispensable in all criminal cases,—of *moral certainty*.

Such is a view (however imperfect) of the manner in

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(a) 1 Stark. Evid. 503.

which a body of circumstantial evidence, of the usual presumptive kind, is found to perform its peculiar function, as an instrument of judicial investigation into the truth of a criminal charge; by making the truth of a fact unknown, and inaccessible by direct means, apparent by inferential deduction from the truth of other facts left within the reach of the investigator. The perfection of its operation may be summarily considered to consist in the combination of the two leading qualities which have been described; by the first of which, a certain given hypothesis is reasonably *indicated as probable*, and by the last, satisfactorily *proved as true*.

The whole process by which the jury are enabled thus to apply the facts in evidence to the fact sought, is, essentially, that of *natural presumption*, (a) as it has already been fully described, (b) unfettered by artificial or arbitrary rules. The faculty principally called into exercise is the *judgment*, or that power (common to all persons of ordinary intelligence) by which the relations of facts are perceived, and their natural significance, bearing and effect accorded to them. And the intrinsic character of the facts themselves, (many of them being of the most familiar kind, and the majority, of a nature to fall under the observation of most men, in the daily concerns of life,) enables the jury to deal with them as they would with a similar body of facts affecting their own private interests, where the conclusion necessary to be formed would be one upon which some important action of their own was to be founded. It was well remarked, in a late important American case, that "the common law appeals to the plain dictates of common experience and sound judgment, and the inference to be drawn from all the facts must be a reasonable and natural one." (c)

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(a) 1 Greenl. Evid § 48.

(b) See *ante*, Chapter II. Section I.

(c) *Shaw, C. J. in Commonwealth v. Webster*, Bemis' Report, 466.

But although this process of presumption is free from the restraints of technical and arbitrary rules, it is, nevertheless, held in constant and salutary control by the mere effect of the grave and often momentous circumstances under which it is exercised. The various minor or auxiliary processes which, in important cases, must always be gone through with, before the facts are prepared for the final question upon them,—those, namely, of analysis, comparison, arrangement and combination,—exclude the hasty and emotional action which often accompanies presumption of the merely natural kind. Conspicuous among these is the process of *weighing*, (*a*)—the appropriate function of the judgment,—whether applied to a single subject, or to two or more in comparison. The whole attitude and frame of the juror's mind, indeed, throughout the trial, should be of a character comporting with the idea which the term “weighing” so expressively conveys. Unlike the philosophical investigator, he has no general principle to settle, but his business exclusively is to interpret into a single collective expression of belief, the particular facts of the case before him. Hence he is not to admit into his mind any pre-conceived theory, with which the facts proved are, if possible, to be squared. The hypothesis of guilt, though proposed in

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(*a*) It has sometimes been said that, in criminal cases, the evidence is not to be weighed. Mac Nally on Evidence, 578. But by this must be understood, that juries are not to suffer their minds to be occupied with nice, elaborate and protracted balancings of conflicting probabilities, in doubtful cases. In the sense of deliberate examination, with a view to ascertain the force of a single subject, the process of weighing must necessarily be carried on constantly; and in the sense of examination, with a view to ascertain the comparative force of two or more subjects, it is found to be exercised at every stage of the trial. The testimony of one witness is weighed against that of another, fact against fact, one group of facts against another; and so it is with the inferences deducible from them, and with the opposite or rival hypotheses which have been before explained. Without weighing, in short, the jury would be left without an indispensable means of forming any judgment on the case before them.

terms as the primary subject of proof, and necessarily occupying the most prominent place, as the principal fact in the case, is not to be considered as a proposition to which the evidence is, if possible, to be adapted, but as a future conclusion to be *naturally drawn out* of it, without straining a single fact beyond its proper significance, and without supplying (except in the way of legitimate inference) a single fact not actually proved.

When the evidence has reached that ultimate point of impressiveness and effect which has been described, although still "presumptive" in one sense, it is no longer merely presumptive, in another. (a) It advances to that higher degree, where it is denominated "conclusive," and becomes invested with the quality of full proof. In other words, the general inference finally deduced from it loses the preliminary, incomplete and conditional character in which it first appeared, and assumes that more full and perfect one, upon which the mind confidently reposes, as—to all human view—the actual truth sought. But the more particular examination of the conclusion itself belongs to the next division of the subject.

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#### SECTION IV.

##### *The Conclusion or Verdict.*

Having, in the preceding section, considered the general process by which the fact sought, or conclusion required from the jury, is deduced by them from the facts shown in evidence; we proceed next and finally, to consider the character of such conclusion itself.

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(a) See *ante*, p. 89.



The object of every criminal trial is the *proof* of the principal fact in issue, or the general affirmative hypothesis proposed,—that the accused is guilty of the crime charged. Proof we have seen to be the result and effect of evidence; that is, it is evidence producing a satisfactory impression upon the mind, or, creating a persuasion or assurance of the truth of the fact sought to be established. In responding, therefore, to the final question which is always asked of the jury,—“guilty or not guilty?”—they virtually respond to the question—“proved or not proved?” For, as they are bound by the rule of law already considered, to presume the accused innocent, *until proved* guilty, failure in this proof serves to confirm the presumption, and therefore necessarily demands a verdict of acquittal.

“By circumstantial or presumptive proof,” observes a learned writer, “is meant that measure and degree of circumstantial evidence which is sufficient to produce conviction in the minds of the jury, of the truth of the fact in question.” (a) But “what circumstances will amount to proof,” the same writer adds, “can never be matter of general definition.” (b) That is to say, the number and quality of the evidentiary facts or circumstances which are to constitute presumptive proof, in any given case, can never be wholly determined in advance, and before the case itself is actually examined. This results from the endless variety of the circumstances themselves, the infinity of combinations of which they admit, and the necessity of always considering them in their true relations to each other. They are presented, not in the character of abstractions, but as the component elements of actual cases or occurrences, which, having passed

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(a) 1 Stark. Evid. 481.

(b) *Id.* 514. See Domat's Civil Law, part I, b. 8, tit. 6, sect. 4, art. 8. The rescript of the Roman emperor *Hadrian* to *Valerius Verus*, as preserved in the Pandects, was to the same effect: *Quæ argumenta ad quem modum probandæ cuique rei sufficiant, nullo certo modo satis definiri potest.* Dig 22. 5. 8

away, are to be *revived* by means of the evidence ; and every one of these elements is to be examined, before its significance and effect can be practically pronounced upon. Hence, every case submitted to a jury is to be determined upon its own peculiar circumstances, and in the exercise of a discretion, on their part, (a) unfettered, as we have seen, by arbitrary or artificial rules ; (b) the only condition imposed by law, (as by natural reason and common sense,) being that the evidence must be sufficient to satisfy their understandings and consciences. (c)

But, although the precise amount of evidence necessary to constitute presumptive proof, can never be reduced to abstract formulæ, applicable to all possible cases, some definite idea of the degree of assurance which should always be produced in the minds of the jury, may be obtained from such considerations as the following. In the first place, it is not essential that the truth of the fact sought should be made to appear with all the clearness of absolute and demonstrable certainty ; that result being unattainable by moral evidence of any kind ; (d) but it is essential that the probability of such truth, (which, as we have seen, (e) is the characteristic basis of all presumptive reasoning,) should be wrought up to a degree of persuasiveness and force, approaching as near to absolute certainty as the nature of the

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(a) Domat's Civil Law, *ubi supra*.

(b) See *ante*, p. 58. Best on Pres. § 190.

(c) 1 Stark. Evid. 514. So the emperor *Hadrian*, in his rescript to *Valerius Verus*, already cited, observed ; " You must be governed by the conviction of your own mind, in determining what you will either believe, or consider to be insufficiently proved ; " (*ex sententia animi tui te aestimare oportet, quid aut credas, aut parum probatum tibi opinaris.*) Dig. 22. 5. 8.

(d) 1 Stark. Evid. 450. Wills Circ. Evid. 5. 1 Greenl. Evid. § 1. Lord *Mansfield*, in the *Douglas* case, (*ante*, p. 28.) Lord *Tenterden*, in *Rez v. Burdett*, 4 B. & Ald. 162. *Shaw*, C. J. in *Commonwealth v. Webster*, Bemis' Report, 470. *Lumpkin*, J. in *Giles v. The State*, 6 Georgia, (*Cobb*,) 276, 285, 286.

(e) *Ante*, p. 80.

subject will admit. The case must not be determined, as civil cases sometimes are, on a mere balance of probabilities, (a) nor must the aggregate probability of guilt be considered as sufficiently established while any counter-probability or even reasonable possibility of innocence is admitted to exist. All hypotheses, involving the idea or supposition of innocence, are to be examined, negatived and excluded, by either being pronounced impossible, or confined to the limits of mere physical possibility. (b) In short, the jury are to be *morally certain* of the guilt of the prisoner, to the exclusion of every reasonable doubt. (c) This *moral* certainty is all that the law, in any case of presumptive proof, requires; (d) and even direct testimony, it is said, does not afford grounds of belief of a higher nature. (e) Evidence which satisfies the minds of the jury to this extent, constitutes *full proof* of the fact in question before them. (f)

But what, it may be asked, is meant by *moral* certainty, and *reasonable* doubt? The expressions are constantly used by judges, in delivering their charges in criminal cases; (g) and jurors, impressed with a proper sense of the responsibilities of their office, may be supposed to be often anxious to obtain as precise an idea, as possible, of the meaning of terms which so comprehensively sum up the duties demanded of them.

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(a) Best on Pres. § 190. 1 Stark. Evid. 451.

(b) Best on Pres. § 195. See *ante*, p. 188.

(c) Parke, B. to the jury, in *R. v. Sterne*, Surrey Summer Assizes, 1848; cited in Best on Pres. § 195, note (l).

(d) 1 Stark. Evid. 514. Clayton, J. in *McCann v. The State*, 13 Smedes & Marshall, 471, 490. Lumpkin, J. in *Giles v. The State*, 6 Georgia, 276, 285, 286.

(e) 1 Stark. Evid. 514.

(f) *Id.* 450.

(g) Parke, B. to the jury, in *R. v. Sterne*, Surrey Summer Assizes, 1848. Alderson, B. in *R. v. Hodge*, 2 Lewin's C. C. 228. Bushe, C. J. in *R. v. Forbes* and others, Dublin, 1828. Lord Gillies in *R. v. McKinley*, 38 Howell's State Trials, 506. Best on Pres. § 195, note (l) citing these cases. Shaw, C. J. in *Commonwealth v. Webster*, Bemis' Report, 470.

Moral certainty is a quality or state of mental impression, which has sometimes been said to be more easily conceived than defined. (a) It has, however, been made the subject of formal definition by several writers of eminence. Thus, *Puffendorf* has explained it to be "nothing else but a strong presumption, grounded on probable reasons, and which very seldom fails and deceives us." (b) But this is rather a description of its foundation and general effect. Mr. *Wills* has defined it to be "that degree of assurance which induces a man of sound mind to act without doubt upon the conclusions to which it leads." (c) The term has also been sometimes made the subject of definition, in charges from the bench. Thus, it was well explained by Chief Justice *Shaw*, in his charge to the jury, in the case of *Commonwealth v. Webster*, (d) to be "a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

Moral certainty may be said to bear the same relation to moral subjects, or matters relating to human conduct, that absolute certainty does to mathematical subjects. It is a state of impression produced by facts, in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it; the conclusion presented being one which cannot, morally speaking, be avoided, consistently with adherence to truth. "The guilt of the accused," observes Mr. *Best*, "must be essentially connected with the facts proved, so as to flow from them by a species of *moral necessity*." (e) "Moral certainty," observes the Marquis *Beccaria*, "is only probability; but which is called certainty, because

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(a) *Best on Pres.* § 195.

(b) *Law of Nature and Nations*, b. 1, ch. 2, sec. 11.

(c) *Circ. Evid.* 7; citing *Stewart's Elements*, vol. 2, chap. 2, sect. 4; *Encyclopædia Brit.* art. *Metaphysics*, part I.

(d) *Bemis' Report*, 470.

(e) *Best on Pres.* § 195.

every man of sense (or, in his senses) assents to it *necessarily*, from a habit produced by the necessity of acting." (a)

It will be seen that, in some of the definitions above given, the nature of moral certainty has been explained, by referring to common experience,—the experience and action of any and every man of sound mind. (b) And the test of its force, in this point of view, is a very practical one. It is not only what men, in general, will unhesitatingly *believe* to be true, but what they will be willing and ready to *act* upon. To practical men, such as jurors usually are, this undoubtedly is the most satisfactory mode of explanation; conveying a more vivid idea of the nature of the certainty in question, than any formal definition in abstract terms, however carefully conceived and expressed. But to make it thoroughly impressive, it should be carried a step farther. The standard referred to, in the way of comparison, should be one with which every juror must necessarily be familiar; and which he can always apply at once, for himself; namely, *his own* experience, and the operations of *his own* mind, in analogous cases. "Is the juror," it should be asked, "so convinced by the evidence, of the truth of the fact sought to be proved, that *he himself* would venture to *act* upon such a conviction, in matters of the highest concern and importance to *his own* interests?" (c) If this be so, he may declare himself *morally* certain.

The meaning of the expression "*reasonable* doubt" comes next to be considered. The definition of this is consequent upon, and, in fact, involved in that of moral certainty. The one quality or state of mind implies the absence of the other, and this is seen in the terms of several of the best definitions. (d) So long as moral certainty is not reached,

(a) Beccaria on Crimes, chap. 14.

(b) *Id. ibid.* Wills Circ. Evid. 7.

(c) 1 Stark. Evid. 514. See Beccaria on Crimes, chap. 14.

(d) See the definition of Mr. *Wills*, cited *supra*. Bishop *Butler*, speaking

a reasonable doubt may be said to remain on the mind. When all reasonable doubt is removed, moral certainty follows. The doubt, which the juror is allowed to retain on his mind, at the close of the trial, and of his own subsequent investigation, and under the influence of which he may frame his verdict, must always be a *reasonable* one. (a) Hence, where it arises from his own misconduct or neglect,—as where he has, through inattention, overlooked facts, or failed to perceive their relations and tendencies, and consequently finds himself at a loss in forming his opinion,—the doubt is not an allowable one. So, where it arises solely from considerations unconnected with the discharge of the duty imposed on him by his oath,—as where it is produced by undue sensibility, in view of the consequences of his verdict in a capital case,—it is not a reasonable doubt. (b) So a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions, and remote conjectures as to possible states of fact, differing from that established by the evidence. (c) It is true, as we have seen, that hypotheses of no higher grade than possibilities may sometimes be entitled to serious regard, and even to preponderant weight; but this is only when the affirmative facts,

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of moral certainty, as to a future event, resolves it into “ground for an expectation, without *any doubt* of it.” Analogy, Introd. And, *e converso*, see the definition of Chief Justice *Shaw*, cited *infra*.

(a) “What is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition, that they cannot say they feel an abiding conviction, to a *moral certainty*, of the truth of the charge.” *Shaw*, C. J. in *Commonwealth v. Webster*, Bemis’ Report, 470. See also the observations of the presiding judge, in charging the jury, in the case of *The People v. Bodine*, 4 N. Y. Legal Observer, 94.

(b) See 2 Evans’ Pothier on Obl. 288, 289.

(c) *Id. ibid.*

already proved, may be accounted for, on the basis of such hypothesis. (a) To acquit, under the influence of doubts unreasonably created, from whatever cause, is not only error, but, in the words of a judicious writer, "a virtual violation of the juror's oath, and an offence of great magnitude against the interests of society; directly tending to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors." (b) On the other hand, when all the facts, upon both sides, have been faithfully examined, and every effort made to ascertain their precise character and bearing, as the real facts of the case, any reasonable doubt finally and permanently remaining on the mind, from whatever cause, even though additional evidence might have completely dispelled it, will always justify a juror in withholding his assent to a verdict of "guilty."

From the preceding view of presumptive evidence, as practically applied to the purposes of judicial investigation, it will be seen that a verdict rendered on evidence of this character, is arrived at in essentially the same way, and by essentially the same means, as any ordinary conclusion from evidence of a similar kind. (c) There is the same order of proceeding throughout:—first, a fact proposed for investigation, in the shape of a question between two opposite hypotheses; next, evidence, presenting a combination of circumstances, as a basis of inference and medium of proof; next, a process of presumptive reasoning, applied to the circumstances thus presented; and finally, a corresponding result deduced, declaring one of the two hypotheses to be *the truth*.

The verdict is, essentially, a *presumption*, however high in degree; because founded upon *belief*, as distinguished

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(a) *Ante*, p. 187. (b) 1 Stark. Evid. 514. (c) Best on Pres. § 14.

from actual knowledge. (a) It has the characteristic quality of a presumption, in this respect, that it is always *contingent*, it may not be true. Supposing the best conceivable use made of the means of investigation which the evidence affords, and the juror's oaths to be most scrupulously observed; two sources of *possible* error will always be found to exist, and can never be effectually excluded or escaped. First, the facts presented in evidence may not be the true and genuine facts of the case; or they may fail to present the case as it actually occurred, arising either from accident, depriving the evidence of its completeness, or from some addition or modification derived from the medium of testimony through which it has passed. And this is a contingency common to direct, as well as circumstantial evidence. Secondly, the inference drawn by the jury, may be, with the best possible intentions on their part, incorrect, from causes which have already been adverted to. But error from the latter cause may be considered as of the more rare occurrence.

The liability of verdicts to error, is sometimes made practically manifest, as in civil cases, by a course of judicial review; and, although an equal scope of re-examination is not allowed in cases of crime, a similar result is occasionally revealed, with equal clearness, by facts which come to light after, (and sometimes long after) the trial has terminated. The term "trial," itself, in short, expresses, with great propriety, the essential character of the whole procedure, as conducted by the light of presumptive evidence, and the contingent quality of the verdict which is the object and end of it. It is, though in the gravest sense, an experiment, an *endeavour* after truth,—an *attempt* to make the best possible use of the best means attainable for the purpose. It is often conducted, from the outset, under disadvantages—sometimes numerous, and occasionally insuperable,—arising from the

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(a) See *ante*, pp. 12, 18. Lord Chancellor *Erskine*, in *Hillary v. Walker*, 12 Vesey, Jun. 239, 266.



transient character of the transaction which is the subject of it; the difficulty of penetrating the veil of obscurity which accident or criminal design may have cast around it, and of obtaining the facts out of which it is to be re-constructed, for the purpose of examination; and the constant necessity, (which, however, is not peculiar to cases of presumptive evidence,) of taking these facts implicitly upon the statements of witnesses, involving, under the most favorable presumptions of veracity, the accuracy and fidelity of faculties confessedly liable, in themselves, to infirmity and error. Consequent upon these processes, is the great, peculiar and indispensable one of inference, as exercised by the jury; by which one single, reasonable and satisfactory conclusion is to be extracted from a mass of often multifarious facts, under difficulties which have already been dwelt upon.

But the error to which verdicts, in their character of mere human conclusions, are thus admitted to be liable, will, it is believed, be found, with very rare exceptions, at least in modern times, to exist on that side to which the law itself, in all cases of reasonable doubt, (as we have just seen) positively turns the balance of the juror's mind; namely, on the side of mercy, rather than of justice,—in acquitting the guilty, rather than in condemning the innocent. The rules by which the application and effect of circumstantial evidence of the presumptive kind, are now understood to be limited, concur to produce this humane and desirable result; and under their operation, as guided by learned and impartial judges, it seems scarcely possible that one of an opposite character can be found to take place. (a)

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(a) It was observed by the presiding judge, in charging the jury, in the case of *The People v. Bodine*, that "the unfrequency of error is manifested by the remarkable fact, that of 984 prisoners in the state-prison at Sing Sing, only 168 pretended to assert their innocence. Yet, of that whole number, a large majority must have been convicted on circumstantial evidence alone." 4 N. Y. Legal Observer, (March, 1846,) 94. And see *post*, Chapter V.

Thus, on the whole, a criminal trial is seen to be an inquiry after truth, with the best means at command, but with means, in their nature, often far short of perfection. That it should sometimes fail in its professed object,—the discovery and identification of a criminal agent,—even in cases where the attainment of such object is most intensely desirable, is a result inseparable from the present conditions of human existence. Failure, in this respect, is often inevitable from the intrinsic insufficiency of the evidence employed ; and its formal announcement, in the shape of a verdict of acquittal, becomes, in such a case, an imperative duty on the part of a jury. But failure to convict may also be positive error ; for it is possible (as will be shown in the sequel) that a mass of circumstantial evidence may be accumulated in a case, which shall indicate guilt and identify the guilty, with a cogency and clearness amounting to moral certainty, and excluding all reasonable doubt. To disregard such a body of proof, however otherwise convincing and satisfactory to the judgment, from a timidity produced by the contemplation of the abstract possibility of error attending it, is not only error in itself, but obvious injustice to the community for whose benefit and at whose instance the inquiry is prosecuted.

## CHAPTER V.

### RELATIVE VALUE OF DIRECT AND CIRCUMSTANTIAL EVIDENCE.

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FROM the description given in the preceding chapters, of the nature and application of circumstantial evidence, its distinctive quality will be seen to lie in what may be termed its argumentative character. (a) It does not indicate the principal fact to which it is applied, without a process of reasoning and *special inference*. (b)

In reasoning from facts proved to facts sought, there is, as already explained, (c) a constant necessity of referring to certain general laws or *principles* by which the course of nature and the conduct of men are found, from experience, to be usually, if not uniformly regulated. But this reference to rule and system is sometimes found to be carried too far. According to Lord *Bacon*, there is a natural tendency in the human mind to suppose a greater order and conformity in things than actually exist. (d) If this be true in regard to external nature, it is not improbable that it sometimes proves so, in matters of moral conduct. It is doubtless a natural habit of the mind to compare facts, and to observe and mark their mutual relations. From this the transition is neither difficult nor unnatural, to the habit of framing these materials

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(a) See *ante*, p. 6.      (b) See *ante*, p. 5.      (c) See *ante*, p. 16—18.  
(d) Bacon's *Novum Organum*, aphor. 45. Best on Pres. §§ 198, 212.

into theories, by the aid of the general principles above referred to ; and of laying them up in the mind for future use. It is by too close an adherence to these pre-conceived ideas or theories, that men are led to reason inaccurately from facts in particular cases ; to indulge in wrong constructions and to deduce unwarrantable inferences. Sufficient allowance is not made for aberration or departure from supposed general or uniform rules, to which mental operations, as the springs of moral conduct, are, in their nature, liable. (*a*) This habit has sometimes been attributed to a feeling of pride or vanity. (*b*) It may proceed, in certain cases, from indolence, or aversion for the patient and accurate consideration of minute and ever-varying particulars. But perhaps the most common source of inaccurate reasoning from facts, in cases of moral conduct, is precipitation, produced or heightened by moral emotion. This is particularly the case where a great crime, or what seems to be such, has been committed in the heart of a community, arousing a sentiment of natural indignation, even at the mere recital of the fact, and creating an intense desire to discover and bring to justice the perpetrator. In such a frame of feeling, the mind is prepared to yield to the force of impressions produced by a few prominent and concurring facts, without waiting to ascertain the whole context of accompanying circumstances, and without admitting them, when ascertained, to every species of reasonable construction and consideration.

It is from causes of this kind, that some lamentable mistakes have, in times past, been made in the application of circumstantial evidence, in judicial investigations of crime ; and that jurors, acting either in the exclusive exercise of their own discretion, or under the influence of narrow or

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(*a*) Theory of Pres. Proof, §4.

(*b*) See the observations of Baron *Alderson*, in *Reg. v. Hodges*, 2 *Lewis's C. C.* 227. *Wills*, Circ. Evid. 82. *Best on Pres.* § 198.

erroneous views of the law of evidence, as expounded by the courts, (a) have drawn conclusions entirely at variance with truth and justice; condemning innocent persons to suffer death for the crimes of others. This has led to the opinion that a species of evidence which not only admits but actually requires a certain latitude and discretion of reasoning in its application, is a dangerous instrument of investigation; and that its use, at least in cases where human life is put in jeopardy, should be discouraged or disallowed. This opinion has not only been supported by abstract or *speculative* reasoning, on the general basis of *intrinsic* liability to error, which was noticed in a previous part of this work; (b) but has had a more practical and impressive form given to it, by being presented in the light of recorded *facts*. Diligent inquiry has been made after all cases, attended with the unfortunate results just mentioned; and they have been skilfully connected and placed in striking points of view, as supposed convincing proofs of the truth of the opinion maintained. (c) Attempts have occasionally been made to influence the popular mind in the same direction, through the medium of works of fiction founded, as asserted, on fact. But the channel through which opinions adverse to the employment of circumstantial evidence have, perhaps, been most effectually, because most directly and urgently, communicated, is one which runs through the very form of judicial procedure itself. At the bar, and in the act and course of exercising their functions as judicial investigators, jurors are constantly accustomed to hear from eloquent advocates for prisoners, the open condemnation, and sometimes the unmeasured denunciation of the use of indirect evidence, as a basis and means of conviction in capital cases; and it is on these occasions that the adverse cases above alluded to are found to be constantly quoted, accompanied by impressive appeals in behalf of the accused.

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(a) Best on Pres. § 191.

(b) See *ante*, p. 69.

(c) See *post*, p. 212.

By influences like these, a state of mind occupying the opposite extreme of that before noticed and condemned, has occasionally been produced; and jurors, instead of acting, as in former days, with an undue desire to enforce the effect of circumstances, as evidence, even where the life of the accused was at their disposal; have been found to entertain, and openly to express a determination not to convict upon such evidence, however strong and clear, in any case where life should be placed in peril. (a)

It may tend to a clearer understanding of the subject of this chapter, to consider this adverse view of circumstantial evidence, with a more particular reference to the grounds upon which it has been formally maintained. These are, first, that it is intrinsically *liable* to mistake and abuse; and secondly, that it *has* actually led to gross injustice, in the conviction and execution of innocent persons.

The liability to error is said to arise from the very process of reasoning and inference which is inseparable from its application. Men, it is said, may and constantly do reason inaccurately, and form opinions, in the way of deduction and presumption, without any sufficient foundation; and human life, in being made to depend upon the correctness of such conclusions, is exposed to great and obvious peril:

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(a) In an article on circumstantial evidence, in the New York Legal Observer for March, 1846, in which the case of *The People v. Bodine* is prominently noticed, the following remarks occur. "In many of the trials in capital cases which have lately taken place in this city, all the profession must have been struck with the apparent prevalence in the popular mind, of a singular error in regard to the propriety of convicting on circumstantial evidence. Very many of the jurors examined have deposed that they would not convict on such evidence, under any circumstances. The error doubtless arises from want of knowledge or reflection upon the subject, but is none the less injurious on that account. On the trial of *Polly Bodine*, this was so strongly exhibited, that the judge, in his charge to the jury, devoted much attention to combatting it." The article proceeds to give that part of the charge in full, and it has been referred to by Professor *Greenleaf*, as embodying a full discussion of the nature and value of circumstantial evidence. 4 N. Y. Legal Observer, 89—95. 1 Greenl. on Evid. § 13 a, nota.

whereas, by the exclusive employment of direct or positive evidence, which admits of no such latitude of reasoning or range of discretion, this source of error and consequent danger is entirely cut off. (a) But it may well be doubted whether the process of inference can be wholly avoided, in the application of judicial evidence of any kind. Not to speak of presumption, as a necessary basis of credence or faith in any human testimony, much that is called direct evidence, will, on a rigid analysis, be found to depend on inference, or in fact to be composed of a series of inferences, though individually so minute, so close in their connection and so rapid in their succession, as not to be perceived in their true character by the mind through which they pass. (b) A witness, on a trial for murder, testifies that he saw the prisoner discharge a loaded gun at the deceased, and that he saw the latter immediately fall lifeless to the ground. This is called strictly *direct* evidence; and is considered to be entirely free from any process of special inference. But the actual nature of the mental operation, in such a case, was very forcibly and philosophically explained by Chief Justice *Gibson*, in his charge to the jury, in the case of *Commonwealth v. Hurman*. (c) "You see a man," said the learned judge, "discharge a gun at another; you see the flash, you hear the report, you see the person fall a lifeless corpse; and you *infer* from all these circumstances, that there was a ball discharged from the gun, which entered his body and caused his death; because such is the usual and natural cause of such an effect. But you did not see the ball leave

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(a) "The senses are ever true, but the understanding often reasons ill." Theory of Pres. Proof, 22.

(b) "So rapid are our intellectual processes," observes a learned writer, "that it is frequently difficult, and even impossible, to trace the connection between an act of the judgment, and the train of reasoning of which it is the result; and the one appears to succeed the other instantaneously by a kind of necessity, as the thunder follows the flash." Wills, Circ. Evid. 16.

(c) 6 Am. Law Journal, 123.

the gun, pass through the air, and enter the body of the slain; and your testimony to the fact of killing is, therefore, only *inferential*,—in other words, circumstantial. It is *possible* that no ball was in the gun; and we *infer* that there was, only because we cannot account for the death on any other supposition.” This is a description of the process of inference, as it unconsciously goes on in the mind of an observing witness. But what is more to our present purpose is the fact that, in the natural course of things, the same process becomes repeated in the minds of the jury before whom he testifies. As the jury must always observe with the senses of the witness, putting themselves, mentally, in his place; and thus transferring themselves to the scene and time of the occurrence related; they must see and hear as the witness saw and heard; and, if they believe him, must of course infer, as he did.

The other reason which has been urged against the propriety, and, indeed, the justice and safety of circumstantial evidence, as a medium of proof in capital cases, is that a reliance upon it *has* repeatedly led to the execution of persons whose entire *innocence* of the crimes for which they suffered, has afterwards been clearly demonstrated. In support of this position, several actual cases, taken chiefly from the records of English courts, have been referred to, and some of them so repeatedly and uniformly on criminal trials, as to justify the appellation given to them by Mr. Justice *Story*, (*a*) of being “the common-places of the law” on such occasions. Among the earliest of these are the case of the uncle and niece, given by Lord *Coke*, (*b*) and that of

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(*a*) In the case of *The United States v. Gibert*, 2 Sumner, 19, 27.

(*b*) An uncle had the bringing up of his niece, who was entitled to some landed property, under her father’s will, to which she would be entitled at the age of sixteen. He was one day correcting her for some offence, when she was heard to say, “Oh, good uncle, kill me not!” After this time, the child could not be heard of, and the uncle being committed to jail on suspicion of her murder, was admonished by the judge of assizes, to find out the child



the person executed for stealing a horse, mentioned by Sir *Matthew Hale*. (a) But the most elaborate collection of cases, considered applicable to the point in question, is to be found in the Appendix to the work published in England, some years ago, under the title of "The Theory of Presumptive Proof." (b) The composition of this work appears to have been occasioned by the result of the trial of Captain *John Donnellan*, who was convicted and executed in 1781, for the murder of his brother-in-law, Sir *Theodosius Boughton*, by poisoning him with laurel-water: its immediate object being to prove that the accused in that case was convicted on insufficient evidence. (c) The drift of the work itself is, on the whole, unfavorable to the employment of circumstantial evidence, as an instrument of capital conviction. But the object of the Appendix is not to be mistaken; the cases there presented going to show, (and in fact being intended to show (d)) the actual and extreme danger of relying upon such evidence as proof in any capital case. So clearly did this appear on their publication in this form, that great and confident use soon came to be made of them,

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against the next assizes. Unable to do this, he dressed up another child to represent her, but the falsehood being detected, he was convicted and executed for the supposed murder. It afterwards appeared, however, that, on being beaten by her uncle, the niece had run away into an adjoining county, where she remained until the age of sixteen, when she returned to claim her property. 8 Inst. c. 104, p. 232; cited in Best on Pres. § 149. 2 Hale's P. C. 290, note

(a) A man was convicted and executed for stealing a horse, on the strength of the presumption of the animal's being found in his possession on the same day on which it was stolen; but it afterwards appeared that the real thief, being closely pursued by the officers of justice, had met the unfortunate man, to whom he was a total stranger, and requested him to walk his horse for him, while he turned aside upon a necessary occasion: and so escaped. Best on Pres. § 210. 2 Hale's P. C. 289.

(b) This work was published anonymously, but has always been considered to have proceeded from the pen of Mr. *Phillipps*, the author of the well known "Treatise on the Law of Evidence." It was actually appended to the first American (from the second London) edition of that work, published in 1816.

(c) Best on Pres. § 208. 3 Benth. Jud. Evid. 232.

(d) See the preface.

by advocates for prisoners ; and sometimes to such an extent as to draw special remark from the courts. (*a*)

Considered superficially, these cases, (of which there are eleven) (*b*) appear entirely adequate to produce the impression intended. But, upon a close analysis, they will all, with a single exception, be found to be possessed of characteristics which deprive them of their appositeness and applicability to the object in question : the convictions, in some of the cases, being founded on palpable fraud, perjury and conspiracy ; in others, being attributable to professional error, the prejudice or superstition of juries, or the honest mistakes of witnesses ; and in others, to the admixture of *direct* evidence itself. (*c*) The 'only case in the collection, of purely circumstantial evidence, in which the conviction had it taken place, could not, in itself, have been censured, is the sixth (anonymous,) in the series, which, it must be admitted, was an extraordinary one. (*d*) But even had the whole eleven been cases of purely legitimate circumstantial evidence, rationally applied, and, thus applied, fatal to innocence, it might have been said of them, in the words of an American judge, (*e*) "the wonder is that there have not

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(*a*) "These cases," observes an American writer, "were, for some time, rung through our criminal courts, as seriously impugning the doctrine which sanctions such evidence. Weak juries were sometimes alarmed by them ; and judges felt bound peremptorily to interpose, in order to maintain the best settled principles in the law of evidence." 8 Phill. Evid. (Cowen & Hill's notes,) Note 305, p. 556. See the observations of *Radcliff*, M. in *Canton & Redding's* case, as given *ibid.* See also the observations of *Thompson*, J. in *United States v. Jones*, cited *Id.* 562 ; and of other judges, cited *ibid.* And as to the effect of these and similar cases upon juries, see further, the observations of *Story*, J. in *United States v. Gibert*, 2 Sumner, 27 ; and of *Gibson*, C. J. in *Commonwealth v. Harman*, 6 Am. Law Journal, 128.

(*b*) Of these, however, only nine were actually attended with fatal results.

(*c*) A critical examination of these cases may be found in 8 Phill. Evid. (Cowen & Hill's notes,) Note 305, pp. 555, 556, (Van Cott's ed. 1850.)

(*d*) This case is given in another form, and at much greater length, in 8 Phill. Evid. (Cowen & Hill's notes,) Note 305, pp. 558—562.

(*e*) *Gibson*, C. J. in *Commonwealth v. Harman*, 6 Am. Law Journal, 321.

been more." They are scattered over a space of more than a century, and are taken from the records of a country whose criminal code then made a great variety of offences capital. It would probably not be difficult to find, on an investigation of the same sources of information, during an equal period, eleven cases in which a reliance on *direct* evidence itself was attended with results equally disastrous and unjust. (a)

On a review of the two leading grounds just considered, upon which the unfavorable view of circumstantial evidence is sought to be maintained, the following considerations present themselves.

First. Intrinsic liability to error is no sufficient objection against the employment of any species of otherwise legitimate evidence. All human evidence is imperfect and fallible, simply because it all comes and must come through an imperfect and fallible medium. (b) The only species of infallible evidence is one which, it has been well said, it would be absurd to require; namely, that which, without the intervention of human testimony, presents itself directly to the senses of the tribunal. (c)

Secondly. If the fact that courts and juries have actually been misled by a species of evidence, even to the extent of convicting innocent persons in capital cases, be a sufficient ground for excluding that species of evidence from use, then direct evidence itself must be discarded; for it is known that innocent persons have sometimes been convicted and executed on what is called *positive proof*; (d) the witnesses against them either designedly swearing to what they knew

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(a) Story, J. in *United States v. Gibert*, 2 Sumner, 19, 27. 3 Phill. Evid. (Cowen & Hill's notes,) Note 305, p. 556.

(b) Best on Pres. § 191. Clayton, J. in *McCann v. The State*, 18 Smedes & Marshall, 471, 489.

(c) 3 Benth. Jud. Evid. 249. Best on Pres. § 191.

(d) Gibson, C. J. in *Commonwealth v. Harman*, 6 Am. Law Journal, 128.

to be false, (a) or, with an honest intention, having been led by mistake to testify to facts which had no actual existence. (b) Indeed, there are cases on record, in which juries have been led to the conviction of innocent persons, by a species of evidence which might well be regarded as stronger than even the direct testimony of any witness, leaving no room for any possible doubt; namely, the voluntary and deliberate confessions of the accused persons themselves. "It is not even certain," to use the language of Mr. Justice *Story*, (c) "that criminals who, in capital cases, plead guilty, and, by confession of their guilt in open court, submit to the sentence of the law, are always guilty of the offence. Cases have occurred in which men have been accused and tried, and convicted of murder, upon their own solemn confession in a court of justice; when it has been afterwards ascertained that the party could not have been guilty; for the person supposed to be murdered was found to be still living, or lost his life at another place, and at a different period. And yet it never has been supposed that a solemn confession in open court was not a just ground to believe the guilt of the party accused." (d)

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(a) Case of *John Delahunt*, executed at Dublin, January, 1842; cited in Best on Pres. § 191, note (s). *R. v. McDaniel* and others, Old Bailey Sessions, 1755, reported in Foster's Crown Law, 121.

(b) Case of *James Crow*, Theory of Pres. Proof, Appendix, case 4. The resemblance of one person to another is a well known and most fruitful source of mistakes as to identity; and several have narrowly escaped conviction on this kind of positive evidence. See Best on Pres. *ubi supra*. This subject will be more particularly considered hereafter, under a separate head.

(c) *United States v. Gibert*, 2 Sumner, 19, 28.

(d) Perhaps the most singular instance on record, of a person deliberately confessing himself guilty of a crime which he never committed, was the celebrated case of "*The Perrys*," called, at the time the account of it was published, "one of the most remarkable occurrences which hath happened in the memory of man." In this case, *John Perry*, a servant of *William Harrison* who had suddenly disappeared on the 16th of August, 1660, being arrested on suspicion of murder, made a voluntary confession before the magistrate, in

“But to what just conclusion,” we may, on the whole, ask in the language of the same eminent judge, “does this tend? Admitting the truth of such cases, are we then to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare that no human testimony to circumstances or to facts, is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundations of the administration of public justice.” (a)

From the consideration of the opinion that circumstantial evidence is a dangerous and unreliable medium of proof, on account of its liability to mislead the judgment of human tribunals, especially in cases where the consequences of error cannot be repaired, we turn next to the opposite opinion which has sometimes been maintained,—that such evidence is worthy of all confidence, because *it cannot mislead*. The essence of this opinion seems to be summed up in the brief expression, which has been used even in judicial opinions,—

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which he declared that it was his (*Perry's*) mother and brother who had robbed and murdered *Harrison*. In his confession, he went into full particulars, describing what had induced them to commit the crime, and how and when it was committed, and what disposition was made of the body; implicating himself throughout as an accessory. Upon this, the three *Perrys* were indicted for the murder, tried, found guilty by the jury, and *all executed*. Some years after, Mr. *Harrison* appeared, and gave an account of what had befallen him, which was, in substance, as follows:—that, on the day of his disappearance, as he was returning home in the evening, he was attacked and seized by three men, who after robbing, wounding and otherwise maltreating him, carried him to Deal, on the sea-coast, where they put him on board a vessel. This vessel was captured at sea, by a Turkish pirate, and *Harrison*, being carried to Turkey, was sold as a slave to a physician living near Smyrna. On the death of his master, he contrived to escape from the country, and returned by the way of Lisbon, to England. See the account in full, in the Appendix to the trial of Capt. *Green* and his crew, 14 Howell's State Trials, 1812—1824.

(a) *United States v. Gibert*, 2 Sumner, 28. The remarkable case of Capt. *Green* and others of his crew, who were executed in Scotland, A. D. 1705, on a charge of piracy and murder, demands a passing notice, in connection with

that "facts or circumstances cannot lie." (a) Before uniting however, in the condemnation which has been bestowed on this proposition by some able writers on judicial evidence, (b) the actual meaning of the expression, or the idea intended to be conveyed by it, should be clearly ascertained.

In the literal sense of the term "lie,"—the utterance of a known falsehood,—the proposition is undoubtedly true, to its fullest extent. Facts cannot lie, and never lie. They are not moral agents, who alone are capable of such action, nor are they subjects of those moral influences which divert human beings from the path of truth. They are inanimate existences, and thus, in their nature, inflexible;—in the common phrase, "stubborn things." (c) Hence they have sometimes been significantly called "mute" or "dumb witnesses." (d) But, giving to the term "lie," a sense more appropriate to inanimate subjects, (and probably the one intended,) that of *deceiving* or *misleading* the senses or the judgment, let us see whether facts or circumstances can ever be said to possess this most undesirable quality.

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the observations in the text, and in the preceding note. This was a case which presented all the three descriptions of evidence by which judicial tribunals are governed in their conclusions, to wit,—*positive* testimony, corroborated by *circumstances*, and the verdict based upon such evidence confirmed by detailed *confessions* of some of the condemned parties. And yet, notwithstanding this multiplication of proof, it turned out, after the execution of Capt. *Green*, the first mate of his ship, and the gunner, that the captain and his crew were wholly innocent of the crimes charged. See the report of the trial in 14 Howell's State Trials, 1199—1298. And see the case and remarks appended, establishing the innocence of the parties, *Id.* 1294—1812.

(a) Paley's Moral and Political Philosophy, book vi. chap. 9. *Mounteney*, B. in *Annesley v. Earl of Anglesea*, 17 Howell's State Trials. 1480. *Legge*, B. in *Rex v. Blandy*, 18 *Id.* 1187. *Buller*, J. in *Rex v. Donnellan*, Gurney's Report, A. D. 1781. *Livingston*, J. in *United States v. Jacobson*, 2 City Hall Recorder, 148.

(b) Mr. *Wills* calls it "a sophism." Circ. Evid. 27. Mr. *Best* speaks of it as a "*dictum*" which has led to mischievous results. Best on Pres. § 192.

(c) Solicitor General, arg. in *Rex v. Barbot*, 18 Howell's State Trials, 1244.

(d) *Temoins muets*. Mittermaier, *Traité de la Preuve*, ch. 58.

The popular application of the term "fact" undoubtedly conveys its true meaning. We every day hear it employed to denote the very reverse of supposition and opinion, much more of fiction and error. A fact is an actual reality or verity,—something absolutely and inflexibly true,—something which has actually existed or does exist,—some event which has actually occurred or does occur. (a) This is fact in the abstract, such as it may exist independently of any human observation, opinion or judgment respecting it. In this sense, *fact* and *truth* are synonymous, and the idea of fact is wholly at variance with any thing like deception or error. The expression, therefore, that "a fact"—that is, a reality or verity, "cannot lie,"—that is, express a falsehood, may very properly be regarded as a truism, or another form of saying that a fact is a fact. (b)

But this is not the only sense in which the term "fact" is used; for, however paradoxical it may appear, there may be such things as *false facts*. (c) In order to be available for any human purpose, facts must become the subjects of human observation. In this point of view, a fact, as observed, is often the real fact as it exists; and the impression made through the senses, upon the mind, is, so to speak, an exact copy of it. But frequently this is otherwise; an *appearance* resembling the fact, or a "counterfeit presentment" of it, impresses the sense so strongly, that it is allowed to take its place, and is believed and reported as such; as may be explained by a few familiar examples.

A. sees an act done by B. who, to his view, and possibly to that of many others, so closely resembles C. as to convey the impression that it is actually C. himself. Here the real and absolute fact of the case is, that the person seen is

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(a) Mr. *Bentham* has divided facts into *states* and *events*. 1 *Jud. Ev.* 47, 48. See his illustrations, *ibid*

(b) *Wills*, *Circ. Evid.* 27.

(c) 3 *Benth. Jurl. Evid.* 251.

B. The fact, as it appears to A.'s sense, and as it impresses his mind and memory, is, that it is C. In this there is manifest delusion and error. The *semblance* of a fact has deceived the observer or witness ; owing to imperfect or hasty observation on his part,—to omission (or, it may be, inability) to notice points of difference, as well as points of similarity. If he reports to a jury, as a fact, what he believes he saw, and they believe him, and act upon his evidence, there is further and much more serious error. But the error is attributable to *no fact* (in the true sense,) as its cause. An appearance has deceived the witness, and, through him, the jury. To honest mistakes of this kind, direct as well as indirect evidence is constantly liable.

Again, A. has been showing to B. a valuable coin from the drawer of a cabinet. B. after handling and closely examining it, returns it to the drawer, and soon after takes his leave. Immediately on his departure, the coin is missed; it is carefully and repeatedly sought for, but cannot be found. No other person except B. has been present. The fact, as it appears to A. and as he would no doubt be willing to state it on oath, is that the coin is not in the cabinet; the inference being that it has been taken by B. But the real fact is just the reverse. It is actually in the cabinet; but having slipped into an unknown or unperceived crevice, it has been entirely *overlooked* in the search. Here again, the deception or error is in the observer himself, and it arises from the same cause, as that intimated in the last example,—neglect or omission to carry the process of observation *far enough* to reach the fact *as it exists*. (a)

But there is a class of facts, of which it has been confidently said that they may and do “lie;” namely, such as are *fabricated* or forged by the perpetrators of crimes, with the express and only intent of deceiving those who may

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(a) A case resembling this is said to have occurred a few years since, at the British Museum.



observe or witness them. A. intending to commit a murder, and being desirous to avert suspicion from himself, by fastening it on another, gets possession of the shoes of B. the soles of which have certain peculiar marks, and also a knife belonging to B.; puts on the former and proceeds unobserved to the scene of the crime, leaving the prints of his feet distinctly impressed on the snow or ground; perpetrates the crime with the knife, which he places near the dead body; and then returns to B.'s house, leaving the knife and the foot-prints to tell the story of the transaction. The impressions are seen as soon as the crime is discovered, traced to the house of B., compared with the shoes found upon his person, and ascertained to correspond with all the peculiar marks upon the soles. The knife is also found, bloody, and proved to belong to B. (a) The observer of these facts concludes that B. was the murderer; and hence it is said that the facts or circumstances "lied" to him. He states them to a jury, on the trial of B. for the crime. If they take his view, adopt his conclusion, and declare B. guilty, the facts are said to lie to them, and to lie "wickedly and cruelly." (b) They undoubtedly do "speak," in the figurative language of Mr. *Bentham*, (c) to the inculpation of a wholly innocent person, because they have been made to speak so. But the criminal has been the liar, rather than the facts or appearances which he has fabricated; they being merely passive, senseless instruments in his hands. The facts reported and acted upon in such a case, are not, as in the preceding examples, *false facts*; that is, facts existing only in statement. They are actual facts, or realities, and the witness has been right in considering them as realities, and in representing them as such. But still the error is essentially on his part, however unavoidable. It is an error,

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(a) See a similar case, reported, as an actual occurrence, in the Appendix to the "Theory of Presumptive Proof," case 10. And see Best on Pres. § 192.

(b) *Id. ibid.*

(c) 8 Jud. Evid. 50.

not of observation but of deduction ; but it is produced essentially, by the same causes as were seen to operate in the previous examples ; namely, want of possession of *all* the facts. It is clear that the actual facts, as they occurred, would never have deceived the most careless observer. Had the criminal been seen in the act of possessing himself of the articles, and in the act of using them, or in either, the mere physical objects and appearances observed would have gone for nothing. The existence of the knife and that of the foot-prints were doubtless facts, but wholly dependent for their significance as *truths*, upon the moral facts,—the facts of conduct—which accompanied and created them ; and which, if observed, would have placed them in their true light ; revealing the fraud, as their absence concealed and aided it.

Again, facts are sometimes fabricated or created by other causes than the act of the criminal ; as where genuine facts of the physical kind, and forming parts of a criminal transaction, have undergone some change, either from accident, or the innocent, ignorant or unconscious act of some person to whom they have been presented. In this altered condition, they are witnessed and reported, (in both respects, accurately) in evidence, and thus lead to the adoption of ideas and conclusions more or less wide from the truth. But in this instance, also, the deception proceeds, not from the genuine facts, but from their subsequent concealment or modification ; and it arises from the same general cause already intimated,—want of possession of *all* the facts.

From the preceding explanation, it may be seen that, in a judicial point of view, and as materials of evidence, facts or circumstances are of several kinds : first, the genuine *facts of a case*, properly so called, that is, the facts as they actually occurred, proceeding in a natural way from the criminal, and indicating truly and consistently their connection with the crime : secondly, *extraneous* facts, having in themselves

a real existence, but interpolated into the case, either by some natural accident, or by the fraudulent act of the criminal himself, or the innocent or unconscious act of some other person; and thirdly, facts reported by witnesses as such, but having *no existence* whatever, being the offspring either of honest mistake or corrupt design. It is obviously to the last two only, that the mendacious or deceptive quality under consideration can, with any propriety, be attributed; and the (so called) facts of the third class are full as likely to be encountered where the evidence is direct, as where it is circumstantial. And even in the case of fabrication, the deception has been shown to be produced as much by the *absence* of facts as by their presence.

The proposition that "facts or circumstances cannot lie," that is, cannot indicate a wrong conclusion, is strictly true in the case of circumstantial evidence of the *certain* kind, as has already been explained. (a)

There is also another sense in which it may be said of facts or circumstances, that they cannot lie; that is, where they are presented as actual verities, to the senses of the tribunal itself. In this aspect, they have been well called "inflexible proofs" (b) and "dumb witnesses;" (c) speaking to the sight only. Unlike the living witness, who often, while under examination, equivocates, takes back his expressions, or mars their effect by voluntary explanations, and is sometimes led to the point of positively contradicting himself, by the pressure of cross-examination,—these inanimate witnesses speak without emotion or confusion. They speak but one language, and in one way; and their meaning cannot be distorted by any efforts of human ingenuity. The

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(a) See *ante*, p. 77. See the observations of the presiding judge in his charge to the jury, in the case of *The People v. Bodine*, 4 New York Legal Observer, 91. 1 Greenl. Evid. § 18a.

(b) Burnet's Criminal Law of Scotland, ch. 21, p. 523.

(c) Mittermaier, ch. 53, cited *ante*, p. 217, note (d).

water-mark discovered in the paper of a written instrument produced before a jury, is a fact of this description.

But facts of this kind, dispensing with the usual channel of judicial communication, are of extremely rare occurrence. (a) In the vast majority of cases, facts must come through witnesses, and here the objection to the expression, that "facts cannot lie," occurs in another form. Granting that facts cannot lie, the witnesses who report them to the jury can and may. (b) Unquestionably; and they may honestly misrepresent also, with results equally disastrous and unjust. That the great source of deception and inlet of error lie in the *medium* of evidence, has perhaps been seen in the analysis of facts already given. How far the admission presents the case to the disadvantage of circumstantial evidence, in particular, will be considered on another page.

On the whole, the truth of the proposition that facts or circumstances "cannot lie," that is, cannot deceive or mislead the judgment of a tribunal, depends upon the class to which they belong, and the signification attached to the term "fact" itself. If, by it, be meant, that the genuine facts of a case, fully and correctly presented in evidence, cannot deceive or mislead a tribunal endowed with ordinary reasoning powers, it is undoubtedly true. If, on the other hand, it be meant, that evidence derived from facts or circumstances, in the most general sense, and as actually presented by the statements of deposing witnesses, can never deceive a jury, or, in other words, is infallible, the proposition is as erroneous as it is extravagant.

Indeed, *both* the opinions respecting circumstantial evidence which have just been reviewed, considered in their broadest expression, are extravagant propositions, occupying opposite extremes: the one placing circumstantial evidence

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(a) Best on Pres. § 191.

(b) Best on Pres. § 192. Theory of Pres. Proof, 28.

far below direct,—and, in some cases, wholly excluding its use ; while the other elevates it to a rank far above direct evidence. They thus present the two species of evidence in an adverse relation to each other, as though they were naturally in conflict, and as though one species could be employed or relied on, only at the other's expense. But this is obviously an incorrect view of the subject,—the two species being parts of *one* system of means, natural as well as judicial ; intended, where they are faithfully used in the cause of truth, to *aid*, and not to thwart each other ; and, when legitimately employed, having constantly such effect. As distinct species, however, they undoubtedly possess characteristic peculiarities ; and, in this point of view, they have often been made the subjects of *comparison*, upon grounds which will now be briefly considered.

There is no difficulty in conceding, at the outset, that, as a medium of judicial proof, direct evidence unquestionably ranks as the superior species. “Abstractedly speaking,” observes Mr. *Best*, “presumptive evidence is inferior to direct evidence, seeing that it is, in truth, only a substitute for it, and an indirect mode of proving that which otherwise could not be proved at all : so that a given portion of credible direct evidence must ever be superior to an equal portion of presumptive evidence *of the same fact*.” (a) So, Mr. *Bentham* remarks that, “regarded in an abstract point of view,—the essence of the species being considered, without regard to the quantity naturally found in a state of conjunction, in the several individual cases,—the inferiority of circumstantial [evidence,] as compared with direct, is out of dispute.” (b) The very nature of direct evidence necessarily leads to this conclusion. It proceeds, at once, to the point at which it aims, by the shortest possible course, and reaches it apparently by a single step, involving the least mental action possible ; whereas, presumptive evidence always proceeds

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(a) *Best on Pres.* § 198.

(b) 8 *Benth. Jud. Evid.* 249.

circuitously and gradually, by a succession of steps, each resting on direct proof, requiring to be constantly borne in mind, and which, however numerous and varied, must all be strictly linked together. The precedence of the former, therefore, rests on grounds of natural propriety and reason, too obvious to be dwelt upon; and it is a precedence which the rules of evidence themselves constantly recognize. Where direct evidence is attainable, circumstantial evidence is of a secondary nature; and no greater discredit can be thrown upon the latter, even in civil cases, than where it is attempted to be used in cases where the former, if attainable is wilfully withheld. (*a*)

It is in its character of a *substitute* for direct evidence, therefore, that circumstantial evidence is most prominently presented; and it is on account of this very feature that it has been pointedly condemned as a medium of proof. "Circumstantial evidence," it has been said, "is merely supplemental, and is only resorted to, from the want of original and direct proof. And it never can be said that what is secondary is equal to that which is original,—the thing substituted equal to that which it is meant to supply." (*b*) But in reply to this, it may be said that the whole policy of the law, and the constant effect of the rules provided for the purpose, are that the substitute shall be *made equal* to the original,—that the operation of the indirect evidence employed shall be made equally as convincing as if it were in

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(*a*) 1 Stark. Evid. 515, 526, 527. See 3 Phill. Evid. (Cowen & Hill's notes,) Note 298.

(*b*) Theory of Presumptive Proof, 56. In support of this view, the writer goes on to quote the remark of Lord Chief Baron *Gilbert*, that "when the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily and usually attend such facts, and called presumptions and not proofs; for they stand instead of the proofs of the fact till the contrary is proved." 1 Gilb. Evid. 142. But the obvious meaning of the passage is that presumptions, (that is, presumptive evidence,) are capable of filling the place, or "standing instead" of proof, (that is, direct evidence,) where the latter cannot be had.

the direct form. (a) And it may be considered a mark of superior wisdom in the whole system of legal provision on the subject, that, in so common a contingency as the failure of direct evidence, a substitute is *provided, capable of adequately filling its place*; so that justice is not left, (as, in the most important cases, it otherwise might be,) without an instrument of action.

The true test of the sufficiency of any species of legitimate evidence obviously is, not its quality in the abstract, but its operation as actually applied; not the manner in which it is made to bear upon the fact sought, but its effect in proving that fact. If the result of its application is a satisfying impression and conviction of truth, it is all that can be required. (b) On the other hand, it is immaterial what the nature of the evidence is, if it is not believed, and does not bring conviction to the minds of the jury. (c)

But it is not only in the character of a substitute for direct evidence, where that cannot be obtained, that circumstantial evidence is available as a medium of proof. It may be, and constantly is used in connection with direct evidence, and as an *aid* to it; being intended as a collateral means of more effectually developing the truth sought. "Possession of the one," observes an acute writer, "affords no reason for neglecting the other." (d) And not only is it thus collaterally used as an aid, but frequently also (and more or less adversely,) as a *test* of direct evidence. (e) And, in both these capacities, it is found to perform as important a function, as

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(a) See Best on Pres. § 190.

(b) See the argument on the trial of Capt. *Green* and his crew, 14 Howell's State Trials, 1288. See also the argument of the Solicitor General, on the trial of *John Barbot*, 18 *Id.* 1801.

(c) Theory of Pres. Proof, 28.

(d) 3 Benth. Jud. Evid. 248.

(e) See the remarks of the presiding judge, in his charge to the jury, in the case of *The People v. Bodine*, 4 N. Y. Legal Observer, 90, 91. And see *post*, in this chapter.

where it is primarily employed to establish the principal fact, and is solely relied on for that purpose.

To pursue the comparison between direct and circumstantial evidence as means of judicial proof,—each of them has been said to possess its characteristic excellencies or virtues; (a) or, in another form of expression, to be attended with peculiar advantages, balanced by corresponding disadvantages, and consequent dangers. Thus, it is said by Mr. *Best*, that “when the proof is direct, as, for instance, consisting of the positive testimony of one or two witnesses, the matters proved are more proximate to the point at issue, or, to speak more correctly, are identical with the physical facts of it, and leave but *two* chances of error, namely, those arising from mistake or mendacity on the part of the witnesses: while in every case of mere presumptive evidence, however long or apparently complete the chain, there is a *third*,—namely, that the inference from the facts proved ever so clearly, may be fallacious. \* \* \* \* On the other hand, a chain of presumptive evidence has some very decided advantages over the direct testimony of a limited number of witnesses.” (b) Mr. *Bentham*, whom he proceeds to quote, has stated these advantages in the following terms. “First, by including in its composition a portion of circumstantial evidence, the aggregate mass on either side is, if mendacious, the more exposed to be disproved. Every false allegation being liable to be disproved by any such notoriously true fact as it is incompatible with; the greater the number of such distinct false facts, the more the aggregate mass of them is exposed to be disproved; for it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognizance of the judge. Secondly, of that additional mass of facts thus apt to be brought upon the carpet by circumstantial evidence, parts more or

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(a) 1 Stark. Evid. 527. 529.

(b) Best on Pres. §§ 198, 194.



less considerable in number will have been brought forward by so many different deposing witnesses. But, the greater the number of deposing witnesses, the more seldom will it happen that any such concert, and that a successful one, has been produced, as is necessary to give effect to a plan of mendacious testimony, in the execution of which, in the character of deposing witnesses, divers individuals are concerned." (a)

A very clear statement of the advantages and disadvantages attending the employment of both species of evidence was given by Chief Justice *Shaw*, in his charge to the jury in the case of *Commonwealth v. Webster*. "The advantage of positive evidence," said the learned judge, "is, that you have the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and the case may not afford the means of detecting his falsehood. \* \* \* \* The advantages [of circumstantial evidence] are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence." (b)

Perhaps the strongest statement of the case, to the disadvantage of circumstantial evidence in the abstract, is contained in the following remarks of Mr. *Hume*: "Certainly, it must be allowed, on the one side, that in any case of pure

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(a) 8 Benth. Jud. 251.

(a) Bemis' Report of the trial, 463, 464.

circumstantial evidence, it is always *possible* that the prisoner may be innocent though *every particular be true* to which the witnesses have sworn ; a thing that *cannot happen* where they swear directly to the deed as done in their presence." Yet even this statement he immediately balances by the remark that, " on the other side, such is the difficulty of contriving an apt and coherent train of circumstances, that perjury is far more easily detected in cases of this description ; and the just influence of the former consideration is not utterly to exclude a sort of evidence which is often irresistible to the mind, and which, with respect to many crimes, is the only sort of evidence that can ordinarily be obtained ; but to recommend to jurymen the propriety of caution and reserve, in which, indeed, they are seldom wanting, as to the sufficiency of the presumptions of guilt, on which they are to condemn." (a)

But, in truth, these two kinds of evidence ought not, in a general view of their merits, to be contrasted or set in opposition to each other. (b) " In the abstract," observes Mr. *Starkie*, " and in the absence of all conflict and opposition between them, the two modes of evidence do not in strictness, admit of comparison ; for the force and efficacy of each may, according to circumstances, be carried to an indefinite and unlimited extent, and be productive of the highest degree of probability, amounting to the highest degree of moral certainty." (c) If the object of comparison were to determine the question which of the two should be exclusively adopted, as a medium of proof ; there would be greater reason in insisting upon the supposed superior merits

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(a) Hume's Commentaries, Trial for Crimes, vol. 2, chap. 15, p. 287 ; cited in the note to the report of the trial of *James Stewart*, 19 Howell's State Trials, 78, 74.

(b) Wills. Circ. Evid. 80.

(c) 1 Stark. Evid. 528.

of the one or the other. But as long as it is admitted that *both must* continue to be employed as instruments of judicial investigation, the only legitimate and rational object of comparison is to bring out more prominently the respective excellencies and imperfections, or advantages and disadvantages of each, with the view of more effectually and safely regulating their application in practice. (a)

According to the opinion of a writer just quoted, the two species are not proper subjects of comparison, unless when in actual opposition to, and conflict with each other. And they are never found to be in conflict, while in the natural sphere of their employment, namely, in the cause of truth: the attainment of truth being the avowed object of all evi-

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(a) In view of what has been considered an unreasonable estimate of the value of circumstantial evidence, complaint has sometimes been made of unfairness in the statement of cases, as the foundation for a comparison between the two kinds of evidence. It has been said that "extreme cases,—the strongest ones of circumstantial, and the weakest of positive evidence,—have been selected for the illustration and support of a general position." Wills, Circ. Evid. 28. The following remarks, taken from a note to the report of the trial of *James Stewart*, (19 Howell's State Trials, 74,) are worthy of attention in connection with this point, although their tendency obviously is towards the adverse view of circumstantial evidence, already considered. "In considering the merits of the two sorts, it seems not to be a legitimate procedure, to state on the one hand a very strong or a very weak case, without stating on the other, a case, as nearly as may be, of correspondent strength or weakness. When it is said, 'witnesses to the fact may be mistaken, may falsify, may err through inadvertence,' &c., it should be recollected that all this is not confined to witnesses of direct facts, but extends also to the witnesses of circumstantial facts; when it is said that circumstances cannot lie, it should be recollected that the relators of circumstances can lie, and that circumstances themselves may deceive; when it is said that the concert of a number of persons to impose on a court of justice a tissue of manifold falsehoods is improbable of contrivance, difficult of execution and easy of detection, it should be recollected that circumstantial evidence contains not always either numerous circumstances, or circumstances which are attested by numerous witnesses; when it is said that circumstances trifling in themselves may by concurrence superinduce decided conviction, it should be recollected that the more trifling in itself is any circumstance, the greater is the probability that it was inaccurately observed, and has been erroneously remembered."

dence. In their essential nature, they are so far from being rival or hostile instrumentalities, that they are often found to partake mutually and intimately of each other's peculiar qualities; and to be sometimes actually resolvable, the one into the other. Thus, circumstantial evidence, as we have seen, is nothing but direct evidence indirectly applied. (a) Direct evidence, on the other hand, when closely analyzed, is found to possess the inferential quality. (b) And direct evidence sometimes becomes converted into circumstantial, in the very act of its delivery. (c) Again, they are in practice constantly found to occur in the closest connection; indeed, they are seldom wholly dissevered,—especially so as to exclude the indirect species. It is very rare, as has been often remarked, that any body of evidence presented to the mind as the basis of a judgment is, on examination, found to consist wholly of direct, without any admixture of circumstantial evidence. (d) Finally, as thus associated, they are constantly found to be mutually consistent, and to co-operate toward the attainment of their common object, with the greatest harmony. That, indeed, may be pronounced the most perfect body of evidence, in which strong direct testimony is sustained throughout, by numerous and according circumstances. (e)

It is when in actual conflict, in particular cases, that the two species may properly be viewed in contrast; and the opposition, thus seen to exist between them, may be made the subject, not only of theoretical consideration, but of practical use. They are always found to come into this kind of conflict, when one of them is diverted from the cause of truth,

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(a) See *ante*, p. 6.

(b) See *ante*, p. 210.

(c) See 3 Benth. Jud. Evid. 8, 9. *Id.* 249, 250.

(d) *Id.* 7.

(e) The proof of divine revelation has been considered by Bishop Butler, to depend, in an important degree, upon this union of direct and circumstantial evidence, in one body. *Analogy*, part 2, chap. 7.

to the support of error, falsehood or fraud. It is in such cases, or where such a state of things is suspected, that circumstantial evidence is found to perform one of its most valuable functions,—that of testing the reliability, or demonstrating the falsity of the most positive testimony. For example, a written instrument is produced in court, on a trial, and proved by witnesses in the amplest manner; and nothing appears on its face to rebut the presumption that it is a genuine instrument. But, on a close and minute examination, a water-mark is seen in the paper, bearing a date some years posterior to the date of the instrument, which at once proclaims it to be a forgery. (a) Again, it constantly happens on trials, that the most positive testimony to the fact of the commission of a crime charged, is effectually rebutted or destroyed by the circumstantial evidence of an *alibi*. But, supposing the fraud to be in circumstantial evidence itself, as where evidence of an *alibi* is fraudulently made up by a concert of witnesses, justice is not left without an adequate test of the fraud, which, in this instance, is furnished by the *same* kind of evidence. (b)

The two great sources of danger to be apprehended, in relying upon evidence of *any* kind, are obviously those already adverted to,—error and fraud in the medium of evidence itself. To honest error in giving testimony, arising from corresponding error in original observation, all witnesses are liable, whether positively swearing to the very fact sought to be proved, or to one or more other facts from

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(a) So, the employment of a paper with a wrong stamp has sometimes afforded the means of detecting a forgery, by bringing to bear, in Mr. *Bentham's* language, “against the body of authenticating evidence a mass of de-authenticating evidence not to be resisted.” 3 *Jud. Evid.* 252, note. See another illustration given in the charge of the presiding judge, in the case of *The People v. Bodine*, 4 *N. Y. Legal Observer*, 90. In regard to dated water-marks in paper, a caution is, however, to be observed, arising from the fact that issues of paper have sometimes taken place, bearing the water-mark of the year succeeding its distribution. *Wills, Circ. Evid.* 29.

(b) See 2 *Evans' Pothier on Oblig.* 291, (Phil. ed. 1853.) 3 *Phill. Evid.* (Cowen & Hill's notes,) Note 288. 3 *Benth. Jud. Evid.* 251.

which the former is to be deduced. Circumstantial evidence has been considered to be *more* liable to error, in consequence of the fact testified to, being often of a trivial and ordinary character, and therefore liable to be more inaccurately (because less attentively) observed, and less faithfully remembered. (a) But this is to be taken subject to the consideration that there is always a coolness on the part of one who observes a fact or occurrence of an ordinary kind, or only collaterally of a criminal aspect, more favorable to accuracy of observation than the excitement naturally affecting the mind of one who sees a crime actually committed; especially a crime of an atrocious cast, or accompanied by great personal violence.

Another source of danger to be apprehended from the employment of *any* kind of evidence, is the wilful corruption of the medium through which the evidence is presented, arising from actual and premeditated design to deceive the tribunal, under a show of truth;—in other words, the fraudulent *fabrication* of evidence. So far as the fabrication is the act of the witness,—namely, the statement of that to be a fact which he knows is not so,—both species of evidence are equally liable to it. The difference consists in the greater difficulty of inventing a sufficient number of significant circumstances, having a proper consistency and connection with each other, and of having them sworn to by an adequate number of witnesses, without presenting points on which their statements may be compared with each other and be so brought in contact with the truth as to lead to the exposure of the fraud. (b) To fraudulent fabrication, on the part of the criminal himself,—constituting what has been termed “forgery of real evidence,” circumstantial evidence is exclusively liable. (c) But, in the opinion of an

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(a) Note to the trial of *James Stewart*, 19 Howell's State Trials, 78, 74. Wills, Circ. Evid. 82.

(b) See 1 Stark. Evid. 528. Wills, Circ. Ev. 217. 3 Benth. Jud. Ev. 251.

(c) See *ante*, p. 181.

acute writer, "it is only here and there, by accident, that real evidence is capable of being fabricated, or, by alteration, adapted to a deceptitious purpose; whereas, there is no case in which it may not happen to man, in the character of a deponent, to stain his deposition by mendacity, if he sees what to him forms an adequate inducement, and is content to run the risk." (a)

But it may, and sometimes does happen that *both* species of evidence are diverted from their natural function and operation of indicating truth, and employed in the support of falsehood and fraud. Thus, both may be actually fabricated by human art, and so skilfully blended into one body, as to present an appearance of harmony, the effect of which it may be difficult for the mind to resist. But the most dangerous species of all fabricated evidence is that which is produced, in part, by the corruption or perversion of the truth itself; as where facts, genuine in themselves, (being actual unfabricated realities or occurrences,) but extraneous to the criminal transaction, as it took place, and withal of a suspicious aspect when viewed in connection with it, have been taken advantage of by the contriver, and interwoven with, and apparently supported throughout by false direct testimony. The most unfortunate cases of erroneous conviction have been based upon evidence of this character. (b) The results in cases of this kind, however, have been attributable, at least, as much to the influence of the direct as of the circumstantial portion of the evidence; and, of course, furnish no especial ground of objection to the use of the latter.

On a final review of the two opinions of the merits of circumstantial evidence, which have been considered in the

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(a) 3 Benth. Jud. Evid. 250.

(b) Best on Pres. § 191, note (s). See the case of *Thomas Harris*, Theory of Pres. Proof, Appendix, case 3.

present chapter, it will be seen that truth occupies the position of a mean between both. The character of the two species of evidence, in behalf of which they have respectively been advocated, may be summed up in the single remark, that while *both*, as merely human instruments, are confessedly and unavoidably fallible, *both*, as instruments of justice, are nevertheless indispensable.

Looking at circumstantial evidence in its leading character of a *substitute* for direct, we at once perceive the test of the probative force which it should possess in any given case where it is solely employed and relied on ;—it should, at least, be *equal* to that of the evidence for which it is substituted. (a) This degree of force it is admitted to be, in itself, capable of attaining ; (b) and there is no necessity for raising or rating it, in general, *higher*. It is true that, in many individual instances, it *may be superior* in proving power to other individual cases of proof by direct evidence. (c) A chain of circumstances, each proved by eye or ear-witnesses, each capable of being contradicted or disproved by the party on whom they are brought to operate, all submitted to the plain sense of a jury of intelligent men, is often *more* to be relied upon than the direct and positive assertions of a witness who may not be intelligent, or who may be dishonest. (d) But a judgment based upon circumstantial evidence cannot, in any case, be *more* satisfactory,

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(a) "In no case," observes Mr. *Starkie*, "ought the force of circumstantial evidence, where it is adequate to conviction, to be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence." 1 *Stark. Evid.* 514.

(b) See the observations of *Parke*, B. in *Rex v. Tawell*, Aylesbury Spring Assizes, 1845 ; reported in *Wills Circ. Evid.* 198, and quoted *Id.* 161. *Butler's Analogy*, part 2, chap. 7.

(c) *Wills*, *Circ. Evid.* 29, and cases cited *ibid.* 1 *Greenl. Evid.* § 18 a.

(d) *Thacher*, J. in *Commonwealth v. Francis*, *Thacher's Crim. Cases*, 240, 246. See also the observations of *Gibson* C. J. in *Commonwealth v. Harman*, 6 *Am. Law Journal*, 128. 4 *Barr's R.* 272.



than when the same result is produced by direct evidence free from suspicion of bias or mistake. (a)

Of the adverse view of circumstantial evidence, it must, however, be said that, though unreasonable and untenable in the length to which it has been carried, it has not been without a most salutary effect upon the actual course of judicial investigation in criminal cases. The admitted liability of the mind to reason inaccurately from combinations of facts, and—more than this—the existence even of a single authenticated case in which an innocent person has actually been condemned and executed upon evidence consisting of a body of genuine and concurring facts, indicating with apparently irresistible force, the conclusion of his guilt,—have taught, in language not to be misunderstood or forgotten, the necessity of unusual caution and vigilance on the part of tribunals to which such evidence may come to be presented. Nearly two centuries ago, and while the law of this branch of evidence was yet in its infancy, these considerations commended themselves to the humane and sagacious mind of Sir *Matthew Hale*. “In some cases,” said that eminent judge, “presumptive evidences go far to prove a person guilty, though there be no express proof of the fact to be committed by him; but then it must be *very warily* pressed, for it is better five guilty persons should escape unpunished, than one innocent person should die.” (b) The same lesson of warning has been studiously inculcated by every writer of authority, on criminal evidence, and in many judicial opinions down to the present day. (c) Indeed, the whole object of the modern law of circumstantial

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(a) Wills, Circ. Evid. 29. See *Id.* 30, 31.

(b) 2 Hale's P. C. 289.

(c) See among others, Hume's Comm. Trial for Crimes, vol. 2, ch. 15, p. 287. 1 Stark. Evid. 480. 1 Phill. Evid. 440. Best on Pres. § 290. Roscoe's Crim. Evid. 14. 2 Evans' Pothier on Obl. 289. 292. Story, J. in *United States v. Gibert*, 2 Sumner, 28. Shaw, C. J. in *Commonwealth v. Webster*, Bemis' Report, 464.

evidence in criminal cases may be said to be—so to direct the application of facts shown in evidence, to the principal fact sought to be proved, as to prevent, by all possible means, the recurrence of any such disastrous and melancholy results as are said to have happened in earlier and less enlightened periods.

The peculiar defect which, in an abstract point of view, must be admitted to exist in circumstantial evidence of the presumptive kind, has been stated with equal clearness and brevity by the Scotch writer *Hume*, already quoted:—"it is always *possible* that the prisoner may be innocent, though *every particular be true*, to which the witnesses have sworn; a thing that cannot happen where they swear directly to the deed, as done in their own presence." (a) Any system of legal rules or provisions aiming to supply this defect, or to diminish the hazards growing out of it in practice, should therefore embrace the following requisitions:—first, the presentation of a body of facts, sufficiently numerous and weighty, and comprising such an accordant mass of moral and physical coincidences, and of precedent, concomitant and subsequent circumstances, as to raise, by their joint and concurrent tendency, a reasonable presumption of guilt; secondly, the application, to the presumption thus raised, of so rigid and thorough a test, or series of tests, as to reduce the abstract possibility of innocence to the level of those possibilities to which direct evidence itself must always be taken to be subject; and finally, an invariable requirement that the accused shall be deemed and pronounced not guilty of the crime charged, in every case where the desired degree of certainty, on the part of the jury, cannot finally be attained. All these requisitions are found to be prescribed and insisted upon, by the modern rules regulating the application of circumstantial evidence in criminal cases, as they have already been explained, and as they will be

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(a) See *ante*, p. 228, 229.

further illustrated in the present work; and, in framing these rules, every thing appears to have been done, that sagacity and humanity, jointly acting under the light of experience, could be expected to accomplish, or that any system of merely human means would, in its nature, admit.

But the attainment of truth, the great object of all judicial investigation, depends upon something more than the theoretical excellence of any system of *rules*, which may be devised for the purpose. It depends, in a most important degree, upon the character of the *tribunal* itself, with which the application of such rules finally and necessarily rests. Circumstantial evidence is, beyond all doubt, a most valuable and effective instrument of justice; but it is sometimes one of great delicacy, demanding a corresponding degree of care and skill on the part of those who may be entrusted with the use of it. It is from the want of this care and skill, more than from any defect inherent in the instrument itself, that occasional injustice has been wrought by it. This leads us, finally, to take some notice of the qualifications which it may be considered desirable or necessary that a body of jurors, called to deal with and interpret a mass of circumstantial evidence, should, at least in theory, possess.

It has been considered a mark of superior wisdom in the common law, that, in criminal cases, it always entrusts the judicial function, so far as dealing with facts is concerned, solely to the hands of a temporary body of investigators, selected casually and summoned for the occasion, and not to a single permanent judge, or standing tribunal of persons who have made the law their professional study or occupation. (a) And the reason of this opinion has been considered as embodied in the observation of the Marquis *Beccaria*, that, in criminal investigations, "the conclusion of an *untechnical* mind, judging by common sense, is safer

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(a) See Best on Pres. § 195, note (1).

than that of a *learned* one, judging by opinion." (a) By such an arrangement, the unfavorable influence of a strict adherence to rule and system, (which sometimes leads to artificial views of actual transactions,) is effectually avoided; and the minds of the investigators are left free to consider the facts presented by individual cases, in a natural light, and to extract the desired truth from them by a natural process. But it does not follow that because the minds of the investigators should be free from technical and artificial influences, they may not possess every *natural* faculty in a high state of excellence, or that the possession of a superior order of mental qualifications may not be desirable, and, in some cases, indispensable to the attainment of true conclusions. What is called "common sense" or "plain and ordinary sense," (b) is confessedly and emphatically the quality or faculty of mind which is always called into exercise, in the process of presumption from facts, (c) whether natural or judicial; and it is, doubtless, adequate to the attainment of the object sought, in all cases where the facts are comparatively few, or easily understood and the process applied to them is short and simple. The same may be said of the faculty of *judgment*, (d) an ordinary measure of which may be all that, in many or most cases, can be required. But it sometimes happens, even in investigations not of a judicial character, that facts are presented in such numbers, variety, and peculiar relations and combinations, that it requires, in the words of Sir *W. D. Evans*, "*great judgment and discretion*," (e) and, in the language of Bishop *Butler*, "*the truest judgment*," (f) to

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(a) *Id.*, citing Beccaria on Crimes, s. 7. In the American translation of *Beccaria*, (Phil. ed. 1819, ch. 14.) the passage is given in other and much less appropriate language.

(b) 1 Stark. Evid. 24. Beccaria on Crimes, ch. 14.

(c) See *ante*, pp. 12, 24, 59.

(d) See *ante*, pp. 23, 80.

(e) 2 Evans' Pothier on Obl. 292.

(f) *Analogy*, part 2, ch. 7.

determine with exactness their quality and force, as a body of evidence, and to deduce from them the single conclusion desired. On trials for high crimes, juries are sometimes called to consider and act upon evidence presenting the results of the most elaborate scientific research ; and even where this is not the case, there are processes, more or less numerous and intricate, to be gone through, before the case is ready for the effectual application of the faculty of judgment. And the difficulties arising from these and similar causes, are heightened by the further and peculiar consideration, that the action of juries is often wilfully embarrassed and impeded by efforts, on the part of the accused, to avoid or prevent the development of the truth, and every endeavor made to throw the judgment off its poise, by appeals to the feelings.

Cases, therefore, may be easily imagined, and doubtless do sometimes occur, in which qualifications and powers such as the following, would be called into the fullest exercise :— a fund of general information, derived from experience and observation ; and embracing, in particular, a knowledge of the human character, and of the principles and influences governing human conduct: (a) a capacity of taking into the mind a large and miscellaneous collection of facts, with a corresponding power of memory to retain them : a power of analysis, by which such a mass of facts may be separated into its component elements, and a power of abstraction, by which each separate element may be allowed its proper share of consideration : the faculty of judgment, in a high state of excellence, involving the power of comparing facts with each other, with the general standards furnished by experience, and with the hypothesis sought to be ultimately established ; so as to secure the observance and estimation of their individual significance and force, their mutual rela-

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(a) See 1 Stark. Evid. 25-30 ; and *Id.* 24, 26. note.

tions, and their separate and united bearing upon the principal object in view; and involving, also, the power of detecting discrepancies and contrasts, as well as of observing coincidences, analogies and resemblances: (*a*) a faculty of arranging and combining separate facts into a connected whole, and in a natural order: a faculty of reasoning logically, though not technically, or of appreciating such reasoning in others: coolness and deliberation in every mental process, preventing a confusion of ideas, and effectually checking all tendency to hastiness of inference: firmness in adhering to what is seen to be the truth, in spite of attempts to move the moral sympathies: patience in submitting to the labor and fatigue attending minute and protracted investigation: and finally, willingness and readiness to re-consider apparently satisfactory conclusions, so that their validity and sufficiency may be tested in every reasonable form, and to the utmost practicable degree.

But, under the system upon which jurors are actually selected for the performance of their duties, these qualifications, however important in a general view of the subject, become, to a great extent, matters of theory, and are necessarily left to implication and inference. The law, it is true, does not overlook them in its provisions; but, in describing them, it contents itself with the most general expressions; (*b*) and, even as thus described, their existence is, of necessity, a matter of reasonable presumption, on the part of the selecting officers, rather than of any actual knowledge. That deficiency in point of such qualifications may contribute

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(*a*) See Theory of Pres. Proof, 48. Hampden's Lectures, quoted in Wills, Circ. Evid. 13.

(*b*) Thus, in New York, the statute requires that jurors shall be "of sound judgment and well informed." 2 Rev. Stat. [411,] § 18, subd. 5. See Mass. Rev. Stat., ch. 95, sec. 4. In Pennsylvania, it describes them as "intelligent and judicious." Dunlop's Laws, p. 558, § 85, (ed. 1858.) In Ohio, they are described as "good, judicious persons." Statutes, chap. 64, § 2. (ed. 1841.)

to the finding of erroneous verdicts, will not probably be denied; although it would be difficult, if not impossible, to ascertain the character and extent of such influence in any particular case. In practice, however, the danger arising from such a cause is lessened in a material degree, by another consideration, with the mention of which, this chapter will be brought to a close.

In theory, jurors are the actual investigators of the *facts* of the cases submitted to them. They are required by law, and bound by their oaths, to examine the evidence *for themselves*, in all its particulars; to weigh its force and decide upon its effect, without reference to the views presented upon either side, and, indeed, without regard even to the remarks of the court itself. But, as trials are actually conducted, the investigation is more strictly *before* the jury, than *by* them. By the effect of the mere course of the procedure, the case is, in a certain sense and in a material degree, investigated for them; and their functions become virtually resolvable into those of superintending and watching its progress, approving or disapproving certain proposed applications or interpretations of evidence, and seeing that substantial justice is done throughout. The efforts and arguments of the contending parties, leading as they do, repeatedly, over the same ground, and particularly the charge of the presiding judge, have the constant effect of marshalling the facts in a convenient order, impressing them upon the memory, and presenting all the essential points which are to be considered in applying them: thus furnishing numerous and important helps to such mental operations as may be required; dispensing sometimes, with the exercise of the more delicate processes; and presenting the case in a compact form which faculties of an ordinary grade may be adequate to grasp, and upon which the final simple answer, in the affirmative or negative of the issue, may be understandingly given.

The best illustrations of the efficacy of circumstantial evidence, in establishing the truth of criminal accusations, are always found in cases which have actually occurred, and have been made the subjects of judicial trial, especially those in which the correctness of the verdict has been subsequently confirmed. Among the most instructive of these is the Scotch case of *Rex v. Richardson*, (a) to which a peculiar prominence has been given by two of the latest writers on circumstantial evidence, (b) and which will now be subjoined as an appropriate conclusion of the present general division of the subject of this work.

In the autumn of 1786, a young woman who lived with her parents in rather a remote part of the stewartry of Kirkcudbright, was one day left alone in the cottage, her parents having gone out to their harvest field. On their return home, a little after mid-day, they found their daughter murdered, with her throat cut in a most shocking manner. The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide; while the surgeons who examined the wound, were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument *in his left hand*. On opening the body, the deceased appeared to have been some months gone with child; and on examining the ground about the cottage, there were discovered the *footsteps*, seemingly, of a person who had been *running* hastily from the cottage, and by an indirect road, through a *quag-mire* or bog, in which there were stepping-stones. It appeared, however, that the person had, in his haste and confusion, slipped his foot, and stepped into the mire, by which he must have been *wet* nearly to the middle of the leg. The prints of the footsteps were accurately measured, and an exact impression taken of

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(a) Burnett's Criminal Law of Scotland, p. 524, *et seq.*

(b) Best on Pres. § 197. Wills, Circ. Evid. 225.



them; and it appeared that they were those of a person who must have worn shoes, the soles of which had been *newly-mended*, and which, as is usual in that part of the country, had iron *knobs or nails* in them. There were discovered, also, along the track of the foot-steps, and at certain intervals, drops of *blood*; and on a stile, or small gateway, near the cottage, and in the line of the footsteps, some marks resembling those of a hand which had been bloody.

A number of persons being present at the funeral, the steward-depute, with a view of obtaining some clue to the murderer, called all the men together, to the number of sixty. He then caused the shoes of each of them to be taken off and measured; and after going nearly through the whole number, they came to the shoes of the prisoner, *William Richardson*, which corresponded exactly to the impressions in dimensions, shape of the foot, form of the sole, apparently *newly-mended*, and the number and position of the *knobs*. (Up to this moment, no suspicion had fallen on any one in particular.) The prisoner, on being questioned where he was, on the day the deceased was murdered, answered, seemingly without embarrassment, that he had been all that day employed at his master's work. Some other circumstances of suspicion, however, having transpired, he was, in a few days after, taken into custody.

On his examination, he acknowledged that he was *left-handed*; and some scratches being observed on his cheek, he said he had gotten them when pulling nuts in a wood, a few days before. He still adhered to what he had said of his having been, on the day of the murder, employed constantly at his master's work, at some distance from the place where the deceased resided; but it appeared that he had been *absent* from his work *about half an hour* (the time being distinctly ascertained) in the course of the *forenoon* of that day; that he had called at a smith's shop, under pretence of wanting something, which it did not appear he had

any occasion for, and that this shop was *in his way to the cottage* of the deceased. A young girl, who was some hundred yards from the cottage, said that, about the time the murder was committed, (and which corresponded to the time that the prisoner was absent from his fellow-servants,) she *saw a person*, exactly with *his dress and appearance*, running hastily *towards the cottage*; but did not see him return; though he might have gone round by a small eminence which would intercept him from her view, and which was the *very track* where the *footsteps* had been traced. His fellow-servants now recollected that, on the forenoon of that day, they were employed, with the prisoner, in driving their master's carts; and when passing by a wood, which they named, the prisoner said that he must run to the smith's shop, and would be back in a short time. He then left his cart under their charge, and, they having waited for him about *half-an-hour*, which one of the servants ascertained by having, at the time, looked at his watch, they remarked, on his return, that he had been longer absent than he said he would; to which he replied that he had stopped in the wood to gather some nuts. They observed, at this time, one of his *stockings wet and soiled*, as if he had stepped into a puddle, on which they asked him where he had been. He said he had stepped into a marsh, the name of which he mentioned; on which one of his fellow-servants remarked that "he must have been either drunk or mad, if he had stepped into that marsh," as there was a foot-path which went along the side of it. It then appeared, by comparing the *time* he was absent with the distance of the cottage from the place where he had left his fellow-servants, that he *might* have gone there, committed the murder, and returned to them.

A search was then made for the *stockings* he had worn that day, and a pair were found. *concealed* in the thatch of the apartment where he slept, and which appeared to be

*much soiled*, and to have some drops of *blood* on them. The last he accounted for, at first, by saying that his nose had been bleeding some days before ; but, it being observed that he had worn *other* stockings on that day, he next said that he had assisted at bleeding a horse, when he wore these stockings ; but it was proved that he had not assisted, but had stood, on that occasion at such a *distance* that *no blood* could have reached him. On examining the *mud* or sand upon the stockings, it appeared to correspond precisely with that of the *mire* or puddle *adjoining the cottage*, and which was of a *particular* kind, none other like it being found in that neighborhood. The shoemaker was then discovered who had mended his *shoes a short time before* ; and he spoke distinctly to the shoes of the prisoner, which were exhibited to him, as having been *those he had mended*.

It then came out that the prisoner had been *acquainted* with the deceased, who was considered in the country as of weak intellect, and had on one occasion been seen with her in a wood, under circumstances that led to a suspicion that he had had criminal conversation with her ; and on being taunted with having such connection with one in her situation, he seemed much ashamed and greatly hurt. It was proved farther by the person who sat next to him, while the shoes were being measured, that he trembled much and seemed a good deal *agitated* ; and in the interval between that time and his being apprehended, had been advised to fly, but his answer was, " Where can I fly to ? "

In the prisoner's defence, evidence was brought to show that, about the time of the murder, a boat's crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased ; and it was said that some of that crew might have committed the murder ; though their motives for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that any thing was missed from the cottages in the neighborhood.

On this evidence the prisoner was convicted and executed. Before his death, he *confessed* that he was the murderer, and said that it was to hide his shame that he committed the deed, knowing that the girl was with child by him. He mentioned, also, to the clergyman who attended him, where the knife would be found, with which he had perpetrated the murder. It was found, accordingly, in the place he described, (under a stone in the wall,) with marks of blood upon it.



## PART II.

**CIRCUMSTANTIAL EVIDENCE, CONSIDERED WITH REFERENCE TO ITS MATERIALS OR ELEMENTS; THEIR USE AND APPLICATION AS PROOF; AND THE RULES OR PRINCIPLES BY WHICH SUCH APPLICATION IS GOVERNED.**

WHAT has been said in the preceding general division will serve to convey a sufficient preliminary idea of the nature, operation and value of circumstantial evidence, as a medium of judicial proof in criminal cases.

It is now proposed to treat of this species of evidence at large, and in detail; and this may be most conveniently done by considering, in the first place, the *sources* from which the evidence is drawn, and the *materials* or elements of which it is composed; and, in the next place, the manner in which these materials are used and *applied* to the purposes of proof. This arrangement seems to suggest the following threefold division of the subject.

I. Facts or circumstances, considered as the elements or materials of evidence; including a view of their sources and varieties, and of their probative force, *individually*

II. Facts or circumstances, as constituting *bodies* of evidence; including a notice of the principles upon which they are applied in practice, and the processes involved in such application.

III. The *rules* regulating the presentation and application of circumstantial evidence, as a means of judicial proof, specially considered and illustrated.

## CHAPTER I.

FACTS OR CIRCUMSTANCES, CONSIDERED AS THE ELEMENTS OR MATERIALS OF EVIDENCE; INCLUDING A VIEW OF THEIR SOURCES AND VARIETIES, AND OF THEIR PROBATIVE FORCE, INDIVIDUALLY.

THE materials or elements of which circumstantial evidence is composed, are, as has already been shown, facts or circumstances of various kinds, directly testified to by witnesses under whose observation they have fallen. (*a*).

It has sometimes been supposed that these facts or circumstances are not, in their nature, susceptible of any definite classification; (*b*) and that, from their infinite number and variety, they do not admit of being enumerated. (*c*) How far the latter opinion may be correct, will, perhaps, appear in the sequel of this work. It seems clear, however, that a classification of some kind is essential to any satisfactory treatment of the subject; and systems of arrangement, more or less exact, have accordingly been adopted by all the best English writers who have undertaken to illustrate it.

Thus, circumstantial evidence, as affirmatively applied to the purpose of *inculpating* an accused party, has been by some writers, considered under the following heads: (*d*) (1) *Real* evidence, (*e*) or evidence from things; (2) Evi-

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(*a*) See *ante*, p. 2, 121.

(*b*) Burke's Works, vol. 2, p. 628.

(*c*) Wills, Circ. Evid. 85.

(*d*) This is the arrangement adopted by Mr. Best. Best on Pres. § 217.

(*e*) This is an expression of Mr. Bentham's, which, with many others,

dence derived from the *antecedent conduct* or position of the accused ; (3) Evidence derived from the *subsequent conduct* of the accused ; (4) *Confessorial* evidence: (a) and, under each of these heads, the infirmative or exculpatory facts and hypotheses, respectively applicable to them, have also been treated of. Others have adopted the following arrangement: (b) (1) *Inculpatory* moral indications ; (2) *Extrinsic* and *mechanical* inculpatory indications ; (3) *Exculpatory* presumptions and evidence.

But the subject seems susceptible of a clearer arrangement under the following divisions and sub-divisions, viz.

I. *Criminative* or inculpatory evidence, as derived,

1. From physical or external objects or appearances ;
2. From the conduct or position of the accused himself ;
  1. Before the commission of the supposed crime,
  2. At or about the time of its commission,
  3. Afterwards.

II. *Exculpatory* evidence or considerations, as derived,

1. From the inculpatory evidence adduced ;
2. From new and distinct evidence.

As this arrangement corresponds not only with the natural order of the subject, but with the actual course of judicial investigation, it will be followed in the present work, as closely as possible.

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has been adopted by Mr. *Best*. "By *real* evidence," says the former, "I understand all evidence of which any object belonging to the class of *things*, is the source; *persons* also included, in respect of such properties as belong to them in common with things." 3 Benth. Jud. Evid. 26.

(a) Another of Mr. *Bentham's* epithets, adopted by Mr. *Best*. 8 Jud. Evid. 100. *Best* on Pres. § 217. Mr. *Wills* employs the better term "confessional." Circ. Evid. 60.

(b) This is Mr. *Wills'* arrangement of the subject. Circ. Evid. 87, 185.



## SECTION I.

*Criminative or Inculpatory circumstantial evidence.*

This species of evidence may be considered as derived from two principal sources,—the *conduct* of the party accused ; and *external objects*, with their appearances, as indicative of such conduct. The latter are sometimes termed “physical facts,” (*a*) and sometimes “extrinsic and mechanical indications,” (*b*) as distinguished from the former, to which the appellation of “moral” is usually applied. They are the visible or sensible marks or traces of human agency ; and their office, tendency and effect, are, first, to establish the commission of *a crime* ; and next, to indicate, trace out and discover *the criminal*. Their peculiar value, in these respects, consists in the circumstance that they are usually produced or created, and left for observation, without intention, and sometimes without consciousness, on the part of those whose action they accompany or follow. They are the evidences which, by a kind of natural force, escape to the notice of observers, through the veil of secrecy which the criminal commonly casts about him ; and frequently, in spite of the utmost precautions he may have adopted. And his own estimate of their importance may be inferred from the attempts constantly made to disguise, destroy or falsify them, whenever left in his power.

As the great mass of these physical or mechanical facts emanate necessarily from human agency, they cannot be considered wholly apart from the idea of such agency. To a certain extent, however, and for certain purposes, they may, as a class of facts, be made the subjects of distinct enumer-

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(*a*) This is the denomination given to them by Mr. *Bentham*. 8 *Jud. Evid.* 11, 22, 51. See *ante*, p. 130.

(*b*) These are the terms employed by Mr. *Will's*. *Circ. Evid.* 90.

ation and enquiry : and hence a distinct head is assigned to them in all the best works on circumstantial evidence. (a) In regard to their order, it may be observed that, although, as elements of any actual criminal transaction, they are posterior, in point of time, to many of the facts denominated "moral," they are generally the *first* which present themselves to observation as the materials of evidence, especially in connection with the *corpus delicti*. On this account, they have been selected as the subject of the section which immediately follows. (b).

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## SECTION II.

### *Physical facts or circumstances.*

Physical or mechanical facts may be conveniently classified under the following heads.

1. The *subject* of the offence. As, in murder, the person killed, or mortally injured, or the remains of such person : (c)—in arson, the building burned, or its remains :—in rape and robbery, the person assaulted or violated :—in robbery and larceny, the thing stolen :—in burglary, the building broken into :—in forgery, the money or instrument fabricated ; and the like.

2. The *appearances* of such subject. *As*, in murder, the position of the body, as left by the criminal, or as concealed

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(a) Best on Pres. §§ 217, 218. 8 Benth. Jud. Evid. 26—34. Wills, Circ. Ev. 90.

(b) Mr. Wills has adopted a different arrangement.

(c) *Eugene Aram's case*, Wills Circ. Evid. 68. *Drayne's case*, 5 London Legal Observer, 128. *Riembauer's case*, 8 *Id.* 242, 277. *Rex v. Greenacre*, Central Criminal Court, April, 1837 ; Wills, Circ. Evid. 171. See *Id.* 166. *Commonwealth v. Webster*, Bemis' Report, 63, 64.

by burial, immersion in water, or otherwise; (*a*) wounds and marks of violence visible upon it; (*b*) the position, direction and number of the wounds, and their particular appearances; (*c*) foreign substances, attached or adhering to the body; (*d*) marks of violence visible upon the dress; (*e*) mutilation, dismemberment and destruction of the body, or portions of it; (*f*) outward appearances indicative of poison; (*g*) detection of poison in the body; (*h*)—in rape and robbery, marks of violence, stains of blood upon the person or clothing:—in arson, the appearances of a fire kindled by design:—in burglary and robbery, marks of violence upon windows, doors, walls, and the like.

3. The *instruments* of the offence. As, in murder, the weapon or instrument of death,—the gun, pistol, knife, dagger, razor, hatchet, axe, club or stone; (*i*) the poison

(*a*) *The People v. Johnson*, New-York Oyer and Terminer, 1824, 2 Wheeler's Crim. Cas. 361, 372. *The People v. Robinson*, N. Y. Oyer and Terminer, June, 1836. *The People v. Beehan*, Suffolk (N. Y.) Oyer and Terminer, October, 1854. *The State v. Cicely*, 13 Smedes & Marshall, 203. *Drayne's case*, 5 Lond. Leg. Obs. 123. *The State v. Carawan*, Superior Court of Beaufort County, N. Carolina, Fall term, 1853; Pamphlet Report, 32, 34. *Rex v. Standfield*, 11 State Trials, 1871, 1407. *The People v. Colt*, N. Y. Oyer and Terminer, January, 1842.

(*b*) See the cases in the last note.

(*c*) *Commonwealth v. Spring*, Phil. Crim. Court, March, 1853. *The State v. Carawan*, Pamphlet Report, 32, 33, 36, 37.

(*d*) *Mrs. Arden's case*, Burke's Trials, connected with the Upper Classes, 1. *The People v. Johnson*, 2 Wheeler's Cr. Cas. 361.

(*e*) *The State v. McCann*, 13 Smedes & Marshall, 478. *The State v. Carawan*, Pamphlet Report, 41.

(*f*) *Rex v. Cook*, Leicester Summer Assizes, 1834; Best on Pres. § 204. *Rex v. Greenacre*, Central Criminal Court, April, 1837; Wills, Circ. Evid. 171. Case in Central Criminal Court, May, 1842; *Id.* 165, 166. *Commonwealth v. Webster*, Bemis's Report, 39, 50, 60, 62, 78, 91.

(*g*) *Rex v. Donellan*, Warwick Spring Assizes, 1781; Gurney's Report *Gottfried's case*, 4 Lond. Leg. Obs. 90.

(*h*) *Rex v. Burdock*, 1835; Best on Pres. § 196. *The People v. Green*, Rensselaer (N. Y.) Oyer and Terminer, July, 1845, Pamphlet Report, 4—6.

(*i*) *The People v. How*, Allegany Oyer and Terminer, Feb. 1824. 2

and its vehicle; (*a*) the cord or handkerchief for strangulation; (*b*) the explosive machine; (*c*)—in rape and robbery, the stupefying liquor or drug:—in arson, the combustibles, matches, lights, and inflammable substances: (*d*) in burglary, the keys, picks, crows, saws, chisels and other burglars' tools: in forgery and counterfeiting, the dies, presses, coining tools, chemical agents, and the like.

4. The *appearances* of such instruments:—such as signs of a fire-arm having been recently discharged; (*e*) stains of blood upon a knife, sword, or hatchet; (*f*) curvature of a sword-blade; (*g*) indentations or fractures of a club; fragments of an exploded machine; (*h*) combustible sub-

Wheeler's Crim. Cas. 412, 417, 419. *Commonwealth v. Fuller*, Lawrenceburg (Indiana) Circuit Court, March, 1820. *Id.* 228, 224. *Rex v. Richardson*, ante, p. 243, 247. *The State v. Cicely*, 18 Smedes & Marshall 203. *The People v. Beehan*, Suffolk Oyer & Terminer, Oct. 1854.

(*a*) *Rex v. Blandy*, 18 State Trials, 1117, 1140. *Rex v. Nairn and Ogilvie*, 19 *Id.* 1235, 1273, 1289, 1292. *Anna Schonleben's case*, 3 Lond. Leg. Observer, 41, 56. *Gesche Margarethe Gottfried's case*, 4 *Id.* 89, 101. *The People v. Kesler*, Schoharie (N. Y.) Oyer and Terminer, Sept. 1827; 3 Wheeler's Crim. Cas. 18, 23. *The People v. Green*, Rensselaer (N. Y.) Oyer & Terminer, July 1845; Pamphlet Report, 6, 7. *The People v. Williams*, New York Oyer & Terminer, May, 1854. *Commonwealth v. Mina*, Bucks (Penn.) Oyer & Terminer, April 1832; Celebrated Trials, (Phil. 1835) 402. See *Com. v. Chapman*, *Id.* 327.

(*b*) *Rex v. Harrison*, 12 State Trials, 838, 849, 850.

(*c*) *The State v. Arrison*, Cincinnati Criminal Court, Dec. 1854. *Rex v. Mountford*, 1 Moody's Cr. Cas. 441.

(*d*) *Rex v. Hill*, 20 State Trials, 1817, 1829, 1831. *The People v. Peverelly*, New York General Sessions, Nov. 1854.

(*e*) *Rex v. Stewart*, 19 State Trials, 1, 137, 138. *Rex v. Barbot*, 18 *Id.* 1280, 1281. *Rex v. Thurtell and Hunt*, Celebrated Trials, (Phil. 1835,) 8.

(*f*) *Rex v. Richardson*, ante, p. 247. Case in Central Criminal Court, May, 1842; Wills Circ. Evid. 166. *The People v. Colt*, New-York Oyer & Terminer, Jan. 1842.

(*g*) *Abercrombie's case*, Dec. 1717; cited on the trial of *James Stewart*, 19 State Trials, 74, 77, note. *The People v. Graham*, New-York Oyer and Terminer, Oct. 1854.

(*h*) *The State v. Arrison*, Cincinnati Crim. Court, Dec. 1854.

stances strewed about and saturated with an inflammable liquid. (*a*).

5. The *place* of the offence, or scene of the crime :—as the building, yard, street, road, field, thicket or wood, (*b*) vehicle or ship, (*c*) where the victim of the murderous or violent assault is found, or to which he or she is decoyed or forcibly carried ; the chamber where the poison is administered, or into which the explosive machine is conveyed ; (*d*) the apartment where the coin is counterfeited ; and the like.

6. The *place* of the offence, considered as the instrument or *means* of its commission :—as the pond, pit, well or stream where the body is drowned ; the rock or precipice over which it has been pushed or thrown ; and the like.

7. The *appearances* of the place or scene of the crime, or of neighboring bodies or places. As, in murder, the bloody floor, bed, chair, path or road ; (*e*) spots or stains of blood on the walls, doors, &c. of a house ; or on well-curbs, gates,

(*a*) *Rex v. Hill*, 20 State Trials, 1817, 1829. *The People v. Peverelly*, N. Y. Gen. Sessions, Nov. 1854.

(*b*) *The People v. How*, 2 Wheeler's Crim. Cas. 412, 418. *The People v. Beehan*, Suffolk Oyer & Terminer, Oct. 1854. *Bathsheba Spooner's case*, 2 Chandler's Am. Crim. Trials, 8, 13, 14. *Rex v. Harrison*, 12 State Trials, 888, 848. *Rex v. Stewart*, 19 State Trials, 1, 92, 95. *The State v. McCann*, 18 Smedes & Marshall, 478, 478. *The State v. Carawan*, Pamphlet Report, 37, 41. *Rex v. Thornton*, Warwick Autumn Assizes, 1817; Celebrated Trials, (Phil. 1835,) 97.

(*c*) *Rex v. Harrison*, 12 State Trials, 888, 849. *Rex v. Goodere*, 17 *Id.* 1003.

(*d*) *The People v. Green*, Rensselaer (N. Y.) Oyer & Term. July, 1845, Pamphlet Report, 18. *The State v. Arrison*, Cincinnati Crim. Court, Dec. 1854.

(*e*) Case of *Mary Norkott* and others, 14 State Trials, 1824. *Riembauer's case*, 8 Lond. Leg. Observer, 242, 277. *Regina v. Courvoisier*, Burke's Trials connected with the Aristocracy, 461, 464. *The State v. Cicely*, 18 Smedes & Marshall, 208. *The People v. Colt*, N. Y. Oyer & Terminer, Jan. 1842. *The People v. Beehan*, Suffolk, (N. Y.) O. & T. Oct. 1854.

stiles, or fences; (*a*) or on trees, grass, snow or the ground itself; (*b*) especially when concealed or attempted to be concealed from view; (*c*) marks of instruments of violence, as indentations, discolorations or perforations made by a ball from a fire-arm, (*d*) or the stroke of a heavy implement; (*e*) marks made by the explosion of a machine; (*f*) marks of struggles, or resistance to violence; (*g*) marks of footsteps at the place, or leading to or from it; (*h*) marks or impressions of certain parts of the offender's body, as of the knee, or hand, bloody finger-marks, &c; (*i*) marks made by dragging a body into a place of concealment; (*j*) lights burning on premises at unusual hours; (*k*) lights suddenly extinguished. (*l*) In arson,—traces of smoke or flame. In burglary,—marks of burglars' instruments, and the like.

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(*a*) *Id. ibid.* *Commonwealth v. Spring*, Phil. Crim. Court, March, 1853. *Rex v. Richardson*, *ante*, p. 244. *Bathsheba Spooner's case*, 2 Chandler's Crim. Trials, 8, 14.

(*b*) *Rex v. Thornton*, Warwick Autumn Assizes, 1817. Wills Circ. Evid. 141. *Rex v. Richardson*, *ante*, p. 244. *Rex v. Johnson and Fare*, 1833; 5 Lond. Leg. Observer, 254, 257.

(*c*) *Rex v. Thurtell and Hunt*, Celebrated Trials, (Phil. 1835,) 7.

(*d*) *The People v. How*, 2 Wheeler's Cr. Cas. 412, 418. *The State v. McCann*, 18 Smedes & Marshall, 478, 477.

(*e*) *Commonwealth v. Spring*, Phil. Crim. Court, March, 1853.

(*f*) *The State v. Arrison*, Cincinnati Crim. Court, Dec. 1854.

(*g*) *Rex v. Brindley*, Warwick Spring Assizes, 1816, Wills, Circ. Evid. 100. *Rex v. Johnson and Fare*, 5 Lond. Leg. Observer, 257.

(*h*) *Mrs. Arden's case*; Burke's Trials, (Upper Classes,) 1. *Rex v. Standfield*, 11 State Trials, 1871, 1407. *Rex v. Thornton*, Celebrated Trials, (Phil. 1835,) 100, 101. *Rex v. Richardson*, *ante*, p. 248. *The State v. Cicely*, 18 Smedes & Marshall, 203, 204. *Rex v. Beards*; Stafford Summer Assizes, 1844, Wills, Circ. Evid. 101. *Rex v. Smith, Varnham and Timms*; Norfolk Spring Assizes, 1837; *Id.* 287.

(*i*) *Rex v. Brindley*, Wills, Circ. Evid. 101. *Mary Norkott's case*, 14 State Trials, 1824.

(*j*) *The State v. McCann*, 18 Smedes & Marshall, 478.

(*k*) *The People v. Johnson*, 2 Wheeler's Cr. Cas. 875.

(*l*) *Drayne's case*, 5 Lond. Leg. Obs. 125

8. *Sounds* heard at the scene of crime, or in its vicinity :— such as cries of distress ; (a) reports of fire-arms ; (b) sounds of an explosion, of bodies falling, of footsteps, of a scuffle, and of voices ; (c) alarms given by animals ; (d) the sound of wheels, or sleigh-bells, or of the trampling of a horse ; (e) noises made by bursting in a door ; (f) sounds heard from locked-up premises, such as the clashing of steel, the shivering of glass, the moving of articles about, the tearing of cloths, the rubbing of a floor, the running of water, the sawing of boards, hammering, and the like ; (g) —total silence immediately following unusual or alarming sounds. (h)

9. *Smells* of smoke or burning substances ; (i) the odor of poisonous substances ; (j) the odor of inflammable liquids prepared for arson, (k) and the like.

10. Impressions on the sense of *touch* ; as the heat of a

(a) *Rex v. Beards*, Wills, Circ. Evid. 101. *Drayne's case*, 5 Lond. Leg. Observer, 128, 125. *Rex v. Thurtell and Hunt*, Celebrated Trials, 6, 10. *The People v. Beehan*, Suffolk O. & T. Oct. 1854.

(b) *The State v. McCann*, *ubi supra*. *The State v. Carawan*, Pamphlet Report, 44.

(c) *The State v. Arrison*, Cincinnati Crim. Court, Dec. 1854. *Drayne's case*, 5 Lond. Leg. Observer, 124. *Rex v. Standfield*, 11 State Trials, 1401. *Rex v. Thurtell and Hunt*, Celebrated Trials, 6. *Rex v. Bishop, Williams & May*, 2 Lond. Leg. Obs. (monthly,) 89, 46. *The People v. Colt*, N. Y. Oyer & Terminer, Jan. 1842. *The People v. Beehan*, *ub. sup.*

(d) *Id. ibid.* *The State v. McCann*, 18 Sm. & Marsh. 480.

(e) *The People v. How*, 2 Wheeler's Crim. Cas. 412, 417. *The State v. McCann*, 13 Smedes & Marshall, 478, 480.

(f) *Rex v. Smith, Varnham and Timms*, Norfolk Spring Assizes, 1837; Wills, Circ. Evid. 287, 288.

(g) *Rex v. Heath and Crowder*, 1881; Wills, Circ. Evid. 97, 98. *The People v. Colt*, N. Y. Oyer & Terminer, Jan. 1842. *Commonwealth v. Webster*, Bemis' Report, 106, 112.

(h) *The People v. Colt*, *ubi supra*.

(i) *Rex v. Hill*, 20 State Trials, 1817, 1831. Case in Central Criminal Court, May, 1842; Wills, Circ. Evid. 166, 167.

(j) *Rex v. Donellan*, Celebrated Trials, (Phil. 1885,) 128.

(k) *The People v. Peverelly*, N. Y. Gen. Sessions, Nov. 1854.

wall, indicating an unusual fire; (*a*) the heat or coldness of ashes in a stove, (*b*) and the like.

11. Impressions on the sense of *taste*; as of a poison to which the tongue is applied; (*c*) of a garment saturated with salt water; (*d*) and the like.

12. *Detached bodies* found at the scene of crime, or in its vicinity; as articles of dress, or portions of them; (*e*) patches for the charge of a rifle; (*f*) a ball extracted from the wood-work of a house, or found at the foot of a tree; (*g*) the ramrod of a pistol; (*h*) grains of wheat scattered about; (*i*) and the like.

13. Symptoms of *poison*; as contortions of the body, spasms, vomiting, swelling, discoloration, complaint of burning and pricking sensations. (*j*)

14. *Peculiarities* about the person of the *accused*;—such as wounds, scratches, bruises; (*k*) stains of blood upon the

(*a*) *Commonwealth v. Webster*, Bemis' Report, 112.

(*b*) *The People v. Bodine*, 4 N. Y. Legal Observer, (March, 1846,) 92.

(*c*) *The People v. Green*, Rensselaer Oyer & Terminer, July, 1845; Pamphlet Report, 29.

(*d*) *Rex v. Barbot*, 18 State Trials, 1229, 1279.

(*e*) *Riembauer's case*, 8 Lond. Leg. Observer, 242, 248. Case at Warwick Spring Assizes, 1818; Wills. Circ. Evid. 95. Case in Central Criminal Court, May, 1842; *Id.* 166. *The People v. Johnson*, 2 Wheeler's Crim. Cas. 861, 376. *The People v. Robinson*, N. Y. Oyer and Terminer, June, 1836. *The People v. Beehan*, *ubi supra*.

(*f*) *The People v. How*, 2 Wheeler's Crim. Cas. 412, 419.

(*g*) *Id. ibid.* *The State v. McCann*, 18 Smedes & Marshall, 471, 482.

(*h*) *Rex v. Patch*, Wills, Circ. Evid. 280, 282.

(*i*) *Rex v. Brindley*, *Id.* 100.

(*j*) *Rex v. Blundy*, 18 State Trials, 1117, 1187. *Rex v. Nairn and Ogilvie*, 19 *Id.* 1285, 1277. *Rex v. Burdock*, Best on Pres. § 196. *The People v. Kesler*, 3 Wheeler's Crim. Cas. 18, 19. *The People v. Green*, Pamphlet Report, 7, 8.

(*k*) *Rex v. Richardson*, *ante*, p. 244. *Rex v. Thurtell and Hunt*, Celebrated Trials, (Phil. 1835,) 5, 7. *Rex v. Dawtry*, York Spring Assizes, 1841; Wills, Circ. Evid. 58. *Rex v. Bolam*, 1839; 18 Lond. Leg. Observer, 887.



person or clothing ; (a) rents, incisions and other injuries to clothing ; (b) disorder or wetness of the dress ; (c) stains of earth, or other substances ; (d) natural marks, such as the want of an eye, finger or front-tooth ; the being left-handed, or carrying the head on one side ; (e) peculiarities of size, shape, gait and voice ; (f) appearances as of something concealed under the dress ; (g) and the like.

15. Peculiarities about *objects* in the possession of the accused ; as the sweating and smoking of a horse in his stable, horse-hair and lint adhering to a newly-discharged rifle. (h)

16. *Materials* of the subject-matter of the offence, or capable of being converted into instruments of the offence, including the means of their production. As, in murder, lead for casting bullets, bullet-moulds, leaves from which a poison could be distilled, utensils for distilling ; (i)—in arson, materials for making inflammable substances : (j)—in forgery and counterfeiting, metal for coining, bank-note paper, bank-note plates engraved, or in process of being engraved,

(a) *Rex v. Richardson*, ante, p. 246. *Rex v. Smith*, *Varnham & Timms*, Wills, Circ. Evid. 237, 240. *Bathsheba Spooner's case*, 2 Chandler's Am. Crim. Trials, 8, 15. *The State v. Cicely*, 13 Sme. & Marsh. 205. *Commonwealth v. Spring*, Phil. Crim. Court, March, 1853. *The People v. Beehan*, ub. sup.

(b) *Rex v. Dawtry*, ub. sup. *Rex v. Bolam*, ub. sup.

(c) *Rex v. Barbot*, 18 State Trials, 1229, 1266. *Rex v. Richardson*, ante, p. 245.

(d) *Rex v. Richardson*, ante, p. 245, 246. *Rex v. Patch*, Wills, Circ. Evid. 230.

(e) *Rex v. Richardson*, ante, p. 244. *Regina v. Rush*, Burke's Trials, (Upper Classes,) 488.

(f) *Rex v. Harrison*, 12 State Trials, 838, 850, 861. *Rex v. Barbot*, 18 Il. 1229, 1275, 1276.

(g) *The People v. How*, 2 Wheeler's Crim. Cases, 417. *Rex v. Beards*, Stafford Summer Assizes, 1844, Wills, Circ. Evid. 101.

(h) *The People v. How*, 2 Wheeler's Cr. Cas. 418, 419.

(i) *Rex v. Donellan*, Gurney's Report, 1781; Celebrated Trials, (Phil. 1835,) 147, 148. See 3 Bentham's Jud. Evid. 232, 233.

(j) *Rex v. Hill*, 20 State Trials, 1317, 1336.

metallic or paper money in process of being fabricated ; and the like.

17. *Receptacles* enclosing or having enclosed the subject, the instrument, or the fruits of the offence. As, in murder, the clothes of the person killed ; (a) the box or chest in which the body or its remains are concealed ; (b) the box for holding an explosive machine ; (c) the drawer, case or trunk, in which pistols are found, or have been kept ; phials or papers containing or having contained poison ; (d)—in arson, the box or case for holding combustibles or secreting a candle ; (e) barrels containing inflammable liquids ; (f)—in larceny or robbery, the closet, drawer, trunk, package or case, containing or having contained the articles stolen ; the floor or wall beneath or behind which they have been concealed, (g) and the like.

18. The *fruits* of the offence. As, in murder, the goods, money, papers, clothing or other valuables, taken at the time, (h) or the property realized afterwards ; (i)—in forgery, the profit obtained, and the like.

19. The *fruits* of the offence, considered as *indicia* of the presence of the offender : as, in murder, accompanied by

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(a) *Rex v. Bishop, Williams & May*, 2 Lond. Legal Observer (monthly,) 89, 81. *The People v. Johnson*, 2 Wheeler's Crim. Cases. 361, 376.

(b) *The People v. Colt*, New-York Oyer & Terminer, Jan. 1842. *Commonwealth v. Webster*, Bemis' Report, 89.

(c) *The State v. Arrison*, Cincinnati Criminal Court, Dec. 1854.

(d) *Rex v. Donellan*, Celebrated Trials, (Phil. 1835,) 128. *Rex v. Blundy* 18 State Trials, 1149, 1154. *The People v. Green* ; Pamphlet Report, 13, 82.

(e) *Rex v. Hill*, 20 State Trials, 1229.

(f) *The People v. Peverelly*, N. Y. Gen. Sessions, Nov. 1854.

(g) *Regina v. Courvoisier*, Burke's Trials, connected with the Aristocracy, 466, 467.

(h) *Id. ibid.* *The People v. Johnson*, 2 Wheeler's Crim. Cases. 380. *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841.

(i) *Rex v. Patch*, Surrey Spring Assizes, 1806 ; Wills, Circ. Evid. 232. *Rex v. Burdock*, Best on Pres. § 196.

robbery, the articles stolen, and carried about from place to place, sold or offered for sale ; (a) and the like.

All the foregoing are so many signs, appearances or tokens of human agency, which, when presented by competent evidence, become *facts*, from which a conclusion of guilt, or the contrary, is to be inferred. Some of them go merely to show a *corpus delicti*, or to answer what is always the first inquiry,—whether a *crime* has been committed. (b) Others go to indicate the *particular* perpetrator, or to prove that the party who is arraigned for trial, was concerned in the crime, as principal or accessory.

A *corpus delicti* is shown by such facts as indicate a distinct criminal human agency ; or, in other words, by those facts which go to negative the supposition or hypothesis that the appearances observed could have been the result of natural causes, or of accident, or of the act of the party injured or slain, or of any irresponsible agency. In cases of alleged murder, the most important facts, for this purpose, are the appearances presented by the body, when found ;—its condition, whether buried, or otherwise concealed, stripped of clothing, or otherwise,—its position and attitude,—the marks of violence visible upon it ;—if wounds, their nature, number and direction,—the particular appearances of bodies found in the water, or suspended by the neck, and the like. Sometimes, the injuries observed are of such a description as to leave little or no room for doubt as to the cause. In other cases, it becomes a difficult matter to determine, for instance, whether certain wounds upon the head have been produced by a fall, or the kick of a horse, (c) or

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(a) *Rex v. Smith, Varnham and Timms*, Norfolk Spring Assizes, 1837. Wills. Circ. Evid. 240, 241. *Rex v. Diggles*, Lancaster Spring Assizes, 1826, *Id.* 58. *Mrs. Spooner's case*, 2 Chandler's Am. Crim. Trials, 15.

(b) See *ante*, p. 119.

(c) *Rex v. Booth*, Warwick Spring Assizes, 1808; Wills, Circ. Evid. 172. *Rex v. Downing*, Salop Summer Assizes, 1822: *Id.* 137.

the blow of a club or other weapon. In such cases, the opinions of medical men, based upon actual inspection and examination, are necessarily sought for and relied on. In cases of alleged poisoning, these professional examinations become of peculiar importance, involving the dissection of the body, to a greater or less extent, and the application of chemical and other tests, for the purpose of detecting the presence of poison in it. This branch of the subject will be more fully considered in another place.

Other facts which go to show that *a crime* has been committed, are, in cases of murder, rape and robbery, the presence of foot-marks, other than those of the deceased, at the scene of the crime ; marks of struggles or resistance to violence ; stains of blood in the vicinity ; cries of distress ; sounds as of falling bodies ; the clothing of the deceased or assaulted person, disordered, torn, stripped off or scattered about ; pockets rifled of their contents ; and the like. The *indicia* of the crimes of arson and burglary will not require repetition.

The *participation* of the accused in the crime proved to have been committed, is shown by those physical facts or appearances which connect him with it ; affording so many natural coincidences, harmonizing with the supposition of his guilt. They are, in other words, the traces, marks, or indications, more or less distinct and impressive, of the presence of a *particular* criminal agent ; and they may be considered under two principal divisions : first, traces or indications at the scene of the crime, derived or supposed to be derived from his person ; and, secondly, traces or indications upon or near his person, derived or supposed to be derived from participation in the crime.

I. Traces or indications at the scene of crime, derived, or supposed to be derived *from the person* of the accused, comprise impressions from physical objects and substances,

as well as the objects and substances themselves ; and may be enumerated in the following order.

1. Impressions *directly* from the person ; such as prints in earth or snow, of the feet or shoes, and impressions of other parts of the body. Of these, (especially in cases of crime committed in rural districts,) *foot-prints* are the most common. They are among the first indications observed after the discovery of a crime, and, indeed, are naturally sought for, (*a*) as furnishing an important clue to the discovery of the criminal, and a means of satisfactory identification of his person ; much of their value consisting in the circumstance that they are usually made and left, (especially where a crime has been committed at night,) unconsciously and inadvertently ; the attention of the criminal being engrossed by the perpetration of the crime itself. They may be considered as of two kinds: *ordinary* foot-prints, exhibiting no peculiar characteristics ; and impressions of a *peculiar* character. The former are important, first as showing the general fact that one or more persons have been present ; (*b*) secondly, as indicating the direction from which they approached, or in which they left the scene of crime, and their movements about it ; and, thirdly, as more immediately indicating the particular perpetrator by inferences which they tend to establish.

In the case of Mrs. *Arden*, and others, who were convicted of the murder of her husband, at Feversham, in England, A. D. 1551, (*c*) the crime was committed in the

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(*a*) In a case of murder which occurred in Mississippi, in 1848, the first remark made by a neighbor to whom information of the transaction had been given, on reaching the scene of the crime, was, "Let us look for tracks." *The State v. Cicely, a slave*, 18 Smedes & Marshall, 208.

(*b*) In the case of *Rex v. Standsfield*, the bank of the river in which the body of the deceased was found, was described by one of the witnesses, as "all beaten to mash with feet." 11 Howell's State Trials, 1871, 1407.

(*c*) 5 London Legal Observer, 59. More fully reported in Burke's Trials connected with the Upper Classes, 1.

house of the deceased, and the dead body was carried out, the same evening, through the garden, into an adjoining field, where it was laid upon the ground. Snow having, in the meantime, fallen, impressions of the murderers' footsteps were left upon it, by which they were tracked from the body to the house, where, new indications of guilt being discovered, the crime was effectually brought home to them.

In the very similar American case of *Mrs. Spooner*, and others, who were convicted of the murder of her husband, at Brookfield, Massachusetts, in 1778, (a) the crime was committed just outside of the house of the deceased, and the body was thrown into a well near his own door. The tracks of several persons on the snow, near the spot, first led to its discovery.

In the late English case of *Rex v. Smith, Varnham and Timms*, (b) three distinct sets of impressions were discovered on the snow around the cottage in which the murder was committed, indicating the presence of three men, and showing their movements about the vicinity in a very satisfactory manner.

Impressions of this kind, outside of a house, may proceed as well from an inmate, as from a person entering from without. An instance of the former is furnished by the case of *Mrs. Arden*, already cited; the tracks showing that the murderers returned to the house, after leaving it. In a case in Mississippi, (c) where almost an entire family had been murdered by a female slave, the foot-prints observed established the same general fact of murder by an inmate, with the additional circumstance that the murderess left the house after the perpetration. In this case, the body of one of the persons killed was found lying on the ground between the gate of the enclosure and the house; and leading from

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(a) 2 Chandler's American Criminal Trials, 3, 18, 14.

(b) Wills, Circ. Evid. 287, 288.

(c) *The State v. Cicely*, a slave, 18 Smedes & Marshall, 292, 208, *et seq.*

the house-door to the spot where it lay, were found two sets of foot-prints, showing that the deceased had run out of the house and been pursued by another person; and from the body to the gate was found but one set of tracks; and similar tracks were found in the road leading in the direction of a house to which the prisoner had gone immediately after the murder. The character of the impressions went to show the falsity of the prisoner's account that the house had been entered by five robbers, who murdered the husband, and then pursued the deceased who had run out of the house with the prisoner, and killed her at the spot where she was found.

On the other hand, the absence of all foot-prints, in places where they would naturally be left by offenders coming from without, tends to establish the same conclusion that the crime was committed by an inmate. This was the fact in the case of *Rex v. Swan and Jefferys*, (a) where a robbery was simulated, to conceal a murder; and the inference was proved to be correct by the full confession made by the prisoners, after conviction. (b)

Foot-prints of the ordinary kind sometimes serve the further purpose of tending to indicate the presence of some *particular* person or persons, by establishing certain intermediate facts, from which, or by the aid of which, such presence may be inferred: as where the character of the impressions shows that they must have been made by a person in the act of *running*; (c) or where two sets of impressions are so clearly distinguished by difference of size, and length of step, as to show that one of the persons must have been a *man* and the other a *woman*, and that the latter had been pursued by the former. In the important English case of

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(a) 5 London Legal Observer, 425.

(b) 18 State Trials, 1193, 1196.

(c) *Rex v. Richardson*, ante, p. 248.

*Rex v. Thornton*, very minute evidence of facts of this kind was given. (a)

Sometimes, such impressions are used to establish the fact of presence more directly, by means of the exact *correspondence* observed to exist between them and the feet or shoes of the accused, proved (which is always essential,) by actual comparison, as by bringing the two objects into juxta-position, and placing the shoe upon the impression. (b) Where no peculiar marks are observed, but the correspondence thus proved is merely in point of superficial shape, outline and dimensions, and those of the ordinary character, it may serve to confirm a conclusion established by independent evidence, but cannot be in itself safely relied on, on account of the general resemblance known to exist among the feet and shoes of persons of the same age and sex. (c) But where certain peculiarities are observed which at once distinguish the impressions from all others, an exact correspondence, verified by the test of comparison, becomes of the highest importance, and the value of such coincidences is obviously increased with the number of the peculiar marks observed. This brings us to the consideration of the second class of foot-prints already mentioned.

The peculiarities observable in these impressions may

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(a) *Celebrated Trials*, (Phil. 1885,) 100—102. As to bloody foot-prints, see the case of *Rex v. Nicholson*, *Id.* 467, 471. *The State v. Cicely*, 18 Smedes & Marshall, 207.

(b) The proper mode of comparison in these cases is, first, to make a new impression with the shoe, close to the original one, and then to place the shoe lightly on the impression itself. See *Rex v. Heaton*, 1 Lewin's Cr. Cas. 116. *Rex v. Shaw*, *Id. ibid.* Wills, Circ. Evid. 104. In the case of *The State v. Cicely*, the prisoner was forcibly made to put her foot into the track.

(c) The circumstance that the impressions have been made by right-and-left shoes or boots, corresponding with the fact that the shoes or boots of the accused are of that description, has been relied on, as an important coincidence, where it has been supported by others. See *Rex v. Thornton*, *ubi supra.* *Rex v. Beards*, Wills, Circ. Evid. 102.



consist in the simple qualities of size, shape and proportion ; and where either of these is found to vary greatly from the ordinary standard, it may serve to identify the person by whose feet the impressions were made, in a very satisfactory manner. But more commonly they are found to consist in certain artificial and mechanical additions to the sole of the boot or shoe, such as patches, tips, and the insertion of nails, the heads of which are left to project more or less from the surface : and, in several cases on record, the correspondences established, in these respects, have been so exact and perfect as to leave no room for doubt as to the person indicated. In *Thornton's* case, two nail-marks, observed in one set of the impressions, were found, on comparison, to correspond accurately with two nails in the sole of one of the prisoner's shoes. (a) In *Richardson's* case, (b) there were more peculiarities of this kind, increasing the number of coincidences, and strengthening the proof in proportion. In the case of *Smith, Varnham* and *Timms*, (c) one of the footsteps was very large and peculiarly shaped and nailed, there being four nails [nail-marks,] in the centre of the heel, in a line from back to front, and two on each side ; and there were nails also in the waist of the heel, between the sole and the heel ; and the sole was very full of nails. The prisoner *Timms'* shoes exactly corresponded with the marks : the other footstep was a smaller one, and full of nails. In the late English case of *Rex v. Beards*, (d) in which the prisoner made a full confession of his guilt, very distinct impressions, made by right-and-left boots, were discovered in the soil near the house where the crime was committed. The right foot-prints had the mark of a tip round the heel ; the impressions of the left foot had a patch fastened to the

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(a) See *Celebrated Trials*, (Phil. 1885,) 100—101.

(b) See *ante*, p. 244.

(c) *Wills, Circ. Evid.* 287, 288.

(d) *Id.* 101, 102.

sole with nails different in size from those on the sole itself; and, altogether, there were four different sorts of nails on the patch and soles; and, in some places, the nails were missing. Suspicion having fallen on the prisoner, who wore right-and-left boots, they were carefully compared with the foot-prints, and found exactly to correspond, as to the patch, the tip, the number, shape, sizes and arrangement of the nails.

Impressions from *other parts* of the body than the feet sometimes answer a similarly useful purpose, in detecting and identifying an offender. In the case of *Rex v. Brindley*, (a) impressions were found in the soil, near the scene of crime, which was stiff and retentive, of the knee of a man who had worn breeches made of striped corduroy, and patched with the same material, but the patch was not set on straight; the ribs of the patch meeting the hollows of the garment into which it had been inserted; which circumstances exactly corresponded with the dress of the prisoner.

Impressions made even by the *teeth* have sometimes furnished important criminative evidence. *Mascardus* (b) has related an instance, where an enclosed ground, set with fruits, was broken into by night, and several of them eaten; the rinds and fragments of some of which were found lying about. On examining these, it appeared that the person who ate them had lost *two front teeth*, which caused suspicion to fall on a man in the neighborhood, who had lost a corresponding number; and he, on being taxed with the theft, confessed his guilt. (c)

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(a) Wills, Circ. Evid. 100.

(b) *De Probat.* quest. 8, n. 24.

(c) Best on Pres. § 218. In a late case of burglary at Albany, where a store was robbed of goods, a number of boards upon which goods were wound, were found near the canal. Upon one of these boards was an indentation, as of a person who used his *teeth* in pulling it from between the goods, and showing that the robber had lost two teeth. This was the case with the individual who had been arrested, and was relied on as a corroborating circumstance against him. New-York paper, January 31st, 1854.

2. Impressions made by *instruments* used by the person come next to be considered. These operate, in the detection of the criminal, in two ways, as just observed respecting foot-prints, that is to say :—first, generally, as indicating the quarter from which the offender came ; and they may have this effect, though the instruments themselves are not found : secondly, specially, as identifying the guilty person ; and this is effected, where the instruments themselves are found, by comparing them with the impressions. As an instance of the former, marks of violence, such as impressions of a chisel, on the outside of the doors or windows of a building, indicate the general fact that the robber or murderer came from without. (*a*). And hence the absence of such impressions will frequently justify the conclusion that the criminal was an inmate of the premises. But such an inference cannot safely be made the basis of a conviction, especially in capital cases, unless it be apparent that access from without could not have been gained in any other way. (*b*)

As instances of impressions of instruments specially indicating the offender, may be mentioned, marks of an iron instrument upon the windows of a house, corresponding with a chisel found in the prisoner's possession, or proved to have been used by him ; (*c*) and marks on a board in the lodgings of one of two prisoners, corresponding with the catches of a vice found in the house of the other. (*d*) And to the same head may also be referred impressions upon letters

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(*a*) In the case of *Regina v. Courvoisier*, a robbery from without had been attempted to be simulated by marks of violence upon a door ; but on examination, it was found that the marks must have been made from within. Wills, Circ. Evid. 243.

(*b*) Inattention to this consideration has sometimes led to the sacrifice of the lives of innocent persons. See the case mentioned by Mr. Starkie (1 Stark. Evid. 518, note,) and referred to, *ante*, p. 184.

(*c*) *Rex v. Bowman*, Alison's Princ. of the Crim. Law of Scotland, 814 Wills, Circ. Evid. 52.

(*d*) *Rex v. Heath and Crowder*, Alison's Princ. 818. Wills, Circ. Evid. 98

mailed (containing fulminating powder,) corresponding with a seal found on the prisoner's person. (*a*)

3. Marks made by instruments held or used by the offender in a *peculiar* manner. These often contribute material aid in fixing the charge of guilt on a particular individual. Thus, where, on examination of the body of a murdered person, the fatal wound appears to have been inflicted by one who held the instrument in his left-hand; (*b*) or where the direction taken by a pistol-ball, shows that the weapon must have been discharged with the left-hand; (*c*) and it is proved or confessed that the accused is a left-handed person; this circumstance, though by no means conclusive in itself, (*d*) requires only the corroboration of others to render it entirely so.

4. *Objects left* at the scene of crime, by the supposed offender, being identified as belonging to him or previously seen in his possession. Of this description of traces of the person, are the instruments of crime themselves; such as the pistol, (*e*) razor, (*f*) knife or hatchet used in committing a murder; articles of dress; such as a hat, a glove, a neck-cloth, a cloak, and the like. (*g*) These furnish obvious means of identifying the criminal.

5. *Objects left* at the scene of crime, corresponding with

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(*a*) *Rex v. Palayo*, Wills, Cir. Ev. 99.

(*b*) *Rex v. Richardson*, *ante*, p. 248.

(*c*) *Rex v. Patch*, Best on Pres. § 218, note (*l*), citing Beck's Med. Jur. 588, 7th ed.

(*d*) Mr. Best remarks that the being left-handed, or having lost front teeth are not very uncommon occurrences. Best on Pres. § 218. The value of these marks consists in their narrowing the range of inquiry, by excluding all persons not possessing them.

(*e*) *Commonwealth v. Hauer* and others, 2 Chandler's Am. Crim. Trials, 858, 854, 856. *Rex v. Howe*, Wills, Cir. Evid. 284—286.

(*f*) *Regina v Sawyer*, Maidstone Spring Assizes, 1839; *Id.* 118.

(*g*) *Rex v. Simmons*, Celebrated Trials, (Phil. 1835.) 57, 58. *Rex v Johnson and Fare*, 5 Lond. Legal Observer, 254. *Le Brun's case*, A. D. 1699. *Id.* 201. *The People v. Beehan*, Suffolk (N. Y.) Oyer & Terminer, Oct. 1854.

other objects in the possession of the supposed offender. Such as a bullet, extracted from the body of the deceased, accurately fitting the barrel of a pistol, or a bullet-mould, found on the accused; (*a*) shot taken from the wound, and ascertained to be of the same quality with other shot found in his possession; (*b*) patches and tow-wadding, found near the body of the deceased, corresponding with similar patches found in the prisoner's rifle-box; (*c*) and the like.

6. *Fragments* or portions of objects found at the scene of the crime, corresponding with other portions of objects, found on the accused, or known to have been in his possession. Of this description are,—a piece of the blade of a knife, found sticking in the window-frame of a house which had been broken into, corresponding with a broken-bladed knife found in the prisoner's pocket; (*d*)—a piece of the blade of a knife found in the body of a person killed, corresponding with the handle of a knife, having a small portion of the blade attached, found near the spot and identified as having been previously in the possession of the accused; (*e*)—a fragment of clothing, found near a rick burned, (*f*) or a body killed, (*g*) corresponding with other clothing of the prisoner;—a fragment of a printed paper, or of a letter,

(*a*) *Rex v. Howe*, Wills, Circ. Evid. 284.

(*b*) *The State v. Carawan*, Beaufort County, (N. C.) Superior Court, Fall Term, 1858. Pamphlet Report, 1854, pp. 36, 56. In *Major Strangways'* case, the charge of the gun by which the deceased was killed, (two bullets and a slug,) corresponded precisely with the charge with which the prisoner had caused a carbine to be loaded, a few hours before. 5 Lond. Legal Observer, 91.

(*c*) *The People v. How*, 2 Wheeler's Crim. Cas. 412, 419.

(*d*) 1 Stark. Evid. 485, 486. Best on Pres. § 218.

(*e*) Case in the Supreme Court of Massachusetts, cited by Shaw, C. J. in his charge to the jury, in the case of *Commonwealth v. Webster*, Bemis' Report, 465, 466.

(*f*) Case at Warwick Spring Assizes, 1818; Wills, Circ. Evid. 95.

(*g*) In the case of *Rex v. Johnson and Fare*, a piece of bloody cloth, found on the spot where the murder was committed, was fitted to a rent at the

used as wadding for the charge of the fire-arm with which the crime was committed, corresponding with another piece found on the prisoner's person or premises ; (a)—a portion of a sheet of paper on which a letter has been written, corresponding with another portion found in the prisoner's desk ; (b) and the like.

The manner in which circumstances of the foregoing description are used in evidence, to show the participation of the accused party in the crime charged, is, as already mentioned, by establishing a connection between such party and the particular appearances or objects observed by the witness. This is effected, in many instances, by the obvious and familiar process of direct *comparison*. The feet or shoes of the party are brought into actual contact with the peculiar foot-marks ; the bullet is applied to the barrel of the pistol ; the chisel, to the mark on the door ; the piece of blade to the broken knife ; the fragment of clothing or paper, to the corresponding fragment. If these objects are found to fit each other accurately, the inference is that they once were in actual contact, or formed parts of the same

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bottom of a pair of trousers, (also bloody,) belonging to one of the prisoners, and pronounced to have once formed a part of them. The opinions of a tailor and clothier were taken in this case. 5 London Legal Observer, 254, 257.

(a) 1 Stark. Evid. 486. Best on Pres. § 218. 8 Benth. Jud. Evid. 256. Shaw, C. J. in *Commonwealth v. Webster*, Bemis' Report, 466. *Rex v. Courtnage and Mossingham* ; Wills, Circ. Evid. 129. And as to correspondences of this kind, existing between different portions of newspapers, see a case mentioned in the New-York Herald of December 15, 1854, quoting the Alexandria (La.) Democrat. See also the case of *Commonwealth v. Francis*, Thacher's Criminal Cases, 240.

(b) *Rex v. Looker*, Wills, Circ. Evid. 139, 140. A correspondence of this kind, in which, however, the connection was much more indirectly shown, was relied on in the case of *The State v. Avery*, before the Supreme Court of Rhode Island, May, 1838. See the testimony of *Harvey Harnden*, *Iram Smith* and *Jeremiah Howland*, given at the trial, (seventh day.)

whole; and by this means, the accused or suspected person is brought into direct and effectual connection with the scene or the subject of the crime. The principle here involved is that of *adaptation* of objects, or parts of objects, by the senses of sight and touch, requiring, in some cases, the most nice and accurate adjustment, and even calling in the aid of optical glasses. (a) Hence, in order to render the process reliable, this comparison should be made while the impressions are recent, or as soon as the objects or fragments are discovered, and before any change, whether accidental or intentional, takes place. In other cases, there is a similar process of bringing one object into actual contact with another, and of direct consequent comparison; as where a ball or shot taken from a wound is compared with other balls or shot found in the party's possession; (b) but such comparison is made, not with the view of establishing any adaptation, and consequent previous connection of the two objects, but of showing such a *similarity* as may suffice to indicate the quarter from which the object came. (c) In other cases there is no physical comparison possible, but the process is nevertheless carried on mentally, and with equal effect: as where it is shown that the fatal wound was inflicted with a knife held in the left-hand, and it is at the same time shown that the accused is a left-handed person: (d) or where it is shown that the deceased was killed by a fire-arm loaded with two balls and a slug, and it is at the same time

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(a) See *The State v. Avery*; testimony of *Harvey Harnden*.

(b) *The State v. Carawan*, Beaufort Co. (N. C.) Superior Court, Fall Term, 1858; Pamphlet Report, 1854, pp. 36, 56.

(c) So, where slugs, taken from the body of a person who has been shot, are found to resemble other slugs, taken from the body of another person, who has been shot immediately afterwards; the inference is that both persons were shot by the same individual, or by such individual, acting in concert with others. *Regina v. Rush*, cited in Taylor's Medical Jurisprudence, 271; (Phil. ed. 1858.)

(d) *Rex v. Richardson*, ante, p. 244.

shown that, shortly before the killing, a carbine was loaded for the accused with precisely the same description of charge, and fired. (a) There are other cases, again, in which the process employed is not so much a comparison of *any* kind, as a direct *tracing out* of the physical fact to its source, either by indications apparent on its face, as where foot-prints, not in themselves peculiar, leading from a dead body to a certain house, point out the inmates of that house as the murderers; (b) or by extrinsic proof; as where a weapon or article of clothing, found near the body is proved to belong to the accused. (c)

II. Traces, marks or indications on the person or premises of the accused, derived or supposed to be derived from the scene or subject of the crime, embrace the following appearances and objects.

1. *Wounds* or marks of violence of a *peculiar* kind; that is, inflicted by the assaulted person in self-defence, or in the course of resistance, either with a particular instrument, or in a particular manner: as where, in a case of robbery, the prosecutor, when attacked, struck the robber on the face with a key; and a mark of a key, with corresponding wards, was visible on the face of the prisoner: (d) or where the person assaulted made several cuts at the robber with a clasp-knife,

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(a) Major *Strangways'* case, 5 Lond. Leg. Observer, 90, 91.

(b) Mrs. *Arden's* case; Burke's Trials, connected with the Upper Classes, 1. So, where the appearance of a wound shows that the fire-arm by which it was made, must have been held close to the head or body; or where the direction of the wound or marks left by the ball on other objects, show that the ball must have entered in front, or from behind, or at the side, or from a higher or lower point; the relative position of the party firing is satisfactorily indicated. Case in 19 London Legal Observer, 810, 811. *The State v. McCann*, 18 Smedes & Marshall, 468, 482, 494. *The State v. Carawan*, Pamphlet Report, 1854, pp. 82, 86.

(c) *Commonwealth v. Hauer*, 2 Chandler's Am. Crim. Trials, 356. *Rex v. Johnson and Fare*, 5 Lond. Leg. Observer, 254, 257.

(d) Case cited in Best on Presumption, § 218.



and corresponding cuts were found in the clothing and on the person of the accused (*a*).

2. *Stains* of particular substances, *visible* on the clothing. These often serve to indicate the presence of the accused at the scene of crime, to trace his movements there, and to trace him from it, as effectually as foot-prints of a peculiar kind. Thus, in the case of *Rex v. Richardson*, (*b*) the stockings of the accused, which had been hidden by him, were found to be soiled with mud, which, on examination, appeared to correspond precisely with the soil of a bog or puddle adjoining the cottage where the murder was committed, and which was of a very particular kind, none other of the same kind being found in that neighborhood. In the case of *Rex v. Patch*, (*c*), the feet of a pair of stockings, proved to be the prisoner's, were found plastered over with a peculiar kind of soil found on a wharf, in front of the house in which the deceased was shot. In this case, the circumstance was necessary only to show the movements of the accused, (who boarded in the same house with the deceased,) in leaving the house just before the shot, and returning immediately after.

To this head may also be referred those cases where the clothing of the accused is found to be impregnated with a fluid substance made use of and remaining at the scene of the crime, which has left no visible stain, but is at once perceptible to the sense of *smell*. (*d*) Even the sense of *taste* has been resorted to, for the purpose of establishing the same general fact. Thus, in the case of *Rex v. Barbot*, (*e*) a waistcoat of the accused, when taken out of his trunk,

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(*a*) *Rex v. Dawtry*, York Spring Assizes, 1841; Wills, Circ. Evid. 58.

(*b*) See *ante*, p. 276.

(*c*) Wills, Circ. Evid. 280.

(*d*) See the case of *The People v. Peverelly*, New-York General Sessions, November, 1854. In this case, a new trial was granted, 1855.

(*e*) 18 State Trials, 1229.

was found, by the application of the tongue, to be impregnated with *salt*, showing that the wearer of it had been wet with salt-water; and thereby serving to prove a fact which it was material to establish: namely, that the accused had gone to the island (over sea,) where the murder was committed, during a stormy night.

The process by which these traces on the person are made use of, to connect the accused with the particular crime charged, is, as in the preceding description of appearances, one of *comparison*; made, in some cases, by actual physical application or juxtaposition,—as by applying the key to the mark supposed to be made by it on the face, or by directly comparing the mud, sand or soil on the clothing, with the mud of the bog or the soil of the wharf from which the stain is thought to have been derived:—and in other cases, conducted mentally, without any actual physical contact; as by comparing the cuts and wounds on the clothing or person, with the particular act of cutting as described; the saltiness of the garment with the known action of seawater: the inference being that the object viewed came from the source indicated, or that the appearance or state of the object viewed, was produced by the act or cause assigned.

3. *Objects* found on the person or premises of the accused, and shown to have been taken from the scene or subject of the crime; such as a watch, (*a*) keys, (*b*) and similar small articles. (*c*)

4. The *fruits* of the crime; such as money, or papers found in the prisoner's possession, (*d*) and shown to have

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(*a*) *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841; Pamphlet Report, p. 16. *The People v. Colt*, New-York Oyer & Terminer, January, 1842.

(*b*) *Rex v. Smith, Varnham and Timms*, Wills, Circ. Evid. 240.

(*c*) *Hill's case*, 16 Lond. Legal Observer, 869.

(*d*) *The State v. Robinson*, Pamphlet Report, 14, 15. *Commonwealth v. Webster*, Bemis' Report, 148—151.

belonged to the person upon whom the crime has been committed. And finally,

5. The *subject* of the crime itself, discovered on the premises of the accused ; such as the body of the murdered person found buried under his house, or dismembered and concealed in a box or other private depository. (a)

In the two species of facts last mentioned, we arrive at the most convincing physical materials that can possibly be made use of in evidence, to connect a person accused with a crime committed. Intermediate facts and inferences are, in such cases, dispensed with ; the mind is no longer occupied with searching for mere traces of the crime or criminal, and connecting them by a chain of subordinate circumstances ; but the two great objects of inquiry are themselves brought visibly at once together ; and, unless the accused can satisfactorily show the agency of *another person* in producing this connection, the evidence will be decisive. But this branch of the subject will be more fully illustrated under a future head.

The object and effect of the various physical facts which have been enumerated under the last two general heads, when presented in evidence, are to fix the guilt of the crime charged on the particular person accused, where the perpetrator was *not seen* in the act, either by the injured party, or another. The accused is thus *identified* as the criminal, by the effect of the inferences which the facts authorize. But the term "identification" is more commonly used to express that species of proof which is peculiar to cases where time or opportunity has been given for a view (however transient,) of the offender, while in the criminal act : evidence being offered to establish the fact that the party on trial, and the offender seen in the act, were one and the same per-

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(a) *The State v. Robinson*, Pamphlet Report, 8—11. *Commonwealth v. Webster*, Bemis' Report, 117, 120.

son ; and the witness swearing that he was the same. Sometimes, such testimony is founded on impressions derived from the *general* appearance of the criminal agent, and the general resemblance of the accused to him, without presenting the particular reasons of the witness' belief. In such cases, it falls properly under the head of *direct* evidence. In other instances, it is based on certain observed peculiarities of the dress or person of the criminal, which are specially testified to by the witness, and found to correspond with similar peculiarities of the accused. In these cases, it strictly belongs to the department of *circumstantial* evidence. Considered as such, it often constitutes a very trust-worthy species of proof ; the particulars pointed out as grounds of belief, serving as so many tests for the detection of error, in the general conclusion of the witness. The whole subject of identification will be more fully considered in another place.

The present section being devoted to the consideration of *criminative* or *inculpatory* circumstantial evidence, the various physical facts which have been enumerated, have been considered solely as sources or materials of *criminative* evidence. The favorable constructions or infirmative hypotheses which they may admit, and the various exculpatory circumstances by which their effect may be qualified, will receive particular attention under a future head.

## SECTION III.

*Moral Circumstances.—Precedent Circumstances.*

The next division of criminative or inculpatory circumstantial evidence comprises such as is derived from the *relations, position and conduct of the accused* party himself; presenting what have been termed (in contra-distinction to the physical circumstances considered in the last section,) the *moral indications* of crime. These may be conveniently considered under the three subdivisions of precedent, concomitant and subsequent circumstances. (a).

*Precedent Circumstances.*

In tracing the connection between a crime and the person suspected or accused of it, as indicated by his *previous conduct* and position, the circumstances to be inquired into naturally occur in the following order.

First, his *character*, as generally disposing or inclining him to the offence.

Secondly, the particulars of his external situation and relation, as more immediately instigating him to its commission; or, in other words, as presenting *motives* to the offence; including, also, the contemplation of the necessary *means* of committing it.

Thirdly, *language* indicative of existing disposition, or design: comprising remote *allusions* to the act in contemplation; expressions of *animosity* against the subject of it; and actual *declarations* of intention, or utterance of *threats* to commit it:—all showing the impression of a motive, and the existence of a purpose, more or less distinctly formed or entertained.

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(a) Buller, J. in *Rez v. Donellan*, Gurney's Report, 1781.

Fourthly, *preparations* for committing the offence : showing the motive in its fullest operation, and a purpose fixed and matured.

Fifthly, *opportunities* and facilities, including the actual possession of the *means* for committing the crime ; serving often to impart additional strength to motives.

Lastly, actual *attempts*, stopping short only of full and effectual perpetration.

But, as the law does not allow general *character* to be adduced, in the first instance, in evidence, as a criminative circumstance, (a) judicial investigation must commence from a lower point in the series above indicated ; and cannot go farther back than those circumstances which tend to show a *motive* on the part of the accused. The following will therefore be the order in which the subject of precedent circumstances will be considered, namely : (1) motives ; (2) means as contemplated ; (3) verbal intimations of the act contemplated ; (4) expressions of ill-will ; (5) declarations of intention ; (6) threats ; (7) preparations, including the acquisition of means ; (8) opportunities and facilities, including the possession of means ; (9) attempts.

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#### SECTION IV.

##### *Motives to the commission of crime.*

In looking at the *motives* which instigate human conduct, we ascend to the very origin of crime. Considered in a general point of view, a field of infinite extent is here opened, abounding in numerous and subtle questions. But

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(a) Best on Pres. §§ 151, 155. 1 Phill. & Amos, Evid. 488, 491. Lord Kenyon, in *King v. Francis*, 8 Esp. 117.

within the narrower limits prescribed by legal rules and reasoning, the subject assumes a simpler character, and may be very fully considered without indulging in loose or general speculation.

A motive, it may be observed, unlike the physical facts considered under the last division, is incapable of being *directly* presented to a tribunal, by evidence of any kind except the actual confession of the individual whose conduct is under investigation. It is not a physical but a psychological fact, (*a*), arrived at indirectly, by inference from facts directly proved. Where the consideration of it becomes necessary, it is, in short, an auxiliary or intermediate principal fact, proved by deduction from minor facts or circumstances, just as the leading ultimate principal fact of guilt is established.

An evil motive, it is said, constitutes in law, as in morals, the essence of guilt (*b*). It is, indeed, the manifest source and spring of all criminal action. Hence the existence and quality of motives frequently become important considerations in investigating crime. (*c*) The effect of particular motives upon human conduct," observes a learned writer, "is a matter of every man's observation and experience, to a greater or less extent; and in proportion to his attention, means of observation and acuteness, every one becomes a judge of the human character, and can conjecture,

(*a*) 1 Benth. Jud. Evid. 45. 3 *Id.* 3, 5. Best on Pres. § 13.

(*b*) Wills, Circ. Evid. 88.

(*c*) "A mischievous event," observes Mr. *Bentham*, "being supposed to have been produced, and *Titius* suspected of having been concerned in the production of it, *What could have been his motive?* is a question, the pertinency of which will never be matter of dispute." 8 Jud. Evid. 183. And as to the importance of inquiring for motives, on trials for crimes, see the observations of *Harris, J.* in charging the jury, in the case of *The People v. Henrietta Robinson*, Rensselaer Oyer & Terminer, May, 1854. 1 Parker's Crim. Reports, 649, 655. See also the observations of *Barculo, J.* in charging the jury, in the case of *The People v. Lake*, Duchess Oyer & Terminer, September, 1858. 1 Parker's Cr. R. 502, 539.

on the one hand, what would be the effect and influence of motives upon any individual, under particular circumstances; and, on the other hand, is able to presume and infer the motives by which an agent was actuated, from the particular course of conduct which he adopted. Upon this ground it is, that evidence is daily adduced, in courts of justice, of the particular motives by which a party was influenced, in order that the jury may infer what his conduct was, under those circumstances; and, on the other hand, juries are as frequently called upon to infer what a man's motives and intentions have been, from his conduct and his acts." (a).

Before proceeding farther with the consideration of this particular subject, it will be proper to devote some attention to the essential meaning of the term "motive" itself, as distinguished from some others with which it is apt to be confounded.

A *motive* is, strictly, what its etymology indicates,—that which *moves* or influences the mind. It is an emotion, passion or desire, (in the case of crime, always an unlawful one,) which impels to action. It is a desire or emotion awakened by the perception or contemplation of some external *object* or end to be attained by action. This ultimate object is, in fact, the cause or spring of the motive itself; and has sometimes been called the exterior or *external* motive, as distinguished from the desire or passion it produces, which is termed the interior or *internal* motive. (b). It is, in other words, the *inducement*, or that which *leads* or tempts the mind to indulge the criminal desire. The close connection of these three terms becomes, on examination, sufficiently apparent, as well as the distinction, in sense, between an object and a motive. The term "inducement" seems, in a great degree, to express the sense of both the others.

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(a) 1 Stark. Evid. 28, 29.

(b) 8 Benth. Jud. Evid. 188.



The terms "purpose," "intention" and "design," are all expressive of mental action in a more advanced stage. As the contemplation of an unlawful object begets in the mind a criminal motive, so the continued presence or influence of such a motive leads, in turn, to the formation of a purpose. From entertaining, perhaps feebly and at intervals, the mere vague and general desire, the mind, in this step, proceeds to the active exercise of volition, resulting in distinct determination. It now wills and resolves to do whatever may be necessary to gain the object desired, and hence arises the formation of whatever *plans* may be necessary to secure its accomplishment. The terms "intent" and "design" are expressive of mental action at its most advanced point, or *as it actually accompanies the outward corporal act* which has been determined on. (a) Intent and design show the presence of *will* in the act which consummates the guilty purpose, in the murderous blow given, or poisonous draught administered. Intent or design is always essential to give a corporal act its criminal quality. (b) An act is said to be *unintentional* or undesigned, when it is involuntary or accidental; and the circumstances which accompany it often serve to reveal and explain the intent. (c) But the motive lies more remote, and is reached with greater difficulty.

Tracing upward or backward the whole mental process which has just been described, it may be said that the corporal act and the mental intent, both constituting one complete action, flow from a previously formed settled pur-

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(a) The Latin words properly expressive of intent and design are the same with those which signify mind itself,—*mens, animus*.

(b) *Actus non facit reum nisi mens sit rea.* 8 Inst. 107.

(c) Intent is, in other words, the exercise of intelligent will; the mind being fully aware of the nature and consequences of the act which is about to be done; and, with such knowledge, and with full liberty of action, willing and electing to do it. The use of the word "meaning," as a synonyme of intent, confirms this explanation.

pose; that such purpose is generated by the operation of a previous motive; and that such motive is awakened by the particular object perceived or contemplated. This object is presented to the mind, either by mere accident, or by the influence of the circumstances and relations in which the guilty actor has been placed. And in these last, we reach the ultimate source of all, beyond which no human action, as it comes to be subjected to judicial investigation, is capable of being followed.

The motives to the commission of crime may be reduced under two principal heads:—the desire of unlawful *gain*, and the gratification of unlawful *passion*. (*a*) Both these are, indeed, essentially attributable to one common ultimate cause,—the operation of the principle of *selfishness*, or the desire to gratify one's own cupidity, hatred, or wanton will, without the least regard to the rights, the comforts or the lives of others.

The motive of *gain*, in the stricter sense of the term, may be excited by two different classes of objects; first, by something visible and tangible, which the party meditating crime desires to possess; and, secondly, by some substantial benefit which is expected to accrue as the result of the contemplated act. The first of these,—the mere desire of plunder,—is the ruling motive in the ordinary crimes of robbery, burglary, larceny and forgery. Sometimes, it constitutes the impulse, or incentive to murder itself: the party whose property is the object of desire, being killed, in order to render its acquisition more speedy and certain. The burglar and highway-robber often murder with this view; (*b*) although, sometimes, the taking of life is not

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(*a*) Mr. *Wills* mentions, as a distinct species of motive,—the desire of preserving reputation, either that of general character, or the conventional reputation of sex or profession. *Wills*, Circ. Evid. 38. But this seems to belong, essentially, to the first of the two heads mentioned in the text.

(*b*) See *Rex v. Howe*, *Wills*, Circ. Evid. 234. *The People v. Wood*, *Grcene* (N. Y.) *Oyer & Terminer*, November, 1853.

resorted to, unless as a means of overcoming resistance, or silencing an attempt to alarm. Another object of murder, as an auxiliary to the crimes just mentioned, is to provide the means of escape, and to avoid the chances of immediate detection. The act, in these cases, is perpetrated, not from any particular animosity against the victim, who is frequently an entire stranger, but solely to remove an obstacle in the murderer's way. Crimes are thus made auxiliary to each other ; arson, for instance, being constantly perpetrated to conceal murder, or to conceal or favor the commission of robbery or theft. In a few cases of uncommon atrocity, murder has been committed solely for the sake of pecuniary gain, unqualified by any other motive, and unassociated with any other crime. In the case of *Rex v. Bishop, Williams and May*; (a) an Italian boy was killed for the sake of his body, which, shortly after the murder, was sold to the demonstrator of anatomy at King's College, for nine guineas. (b)

The force of the gainful motive to crime, when awakened by the sight or the idea of some coveted material object within apparent reach, is often so great and urgent, as to overcome all considerations of possible or even probable danger of injury or loss, to be encountered in the attempt to gratify it. Thieves and burglars, in particular, constantly expose themselves to the risk of losing life or limb, in endeavoring to possess themselves of objects, sometimes, of the most trivial value. (c)

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(a) Tried at the Old Bailey, December, 1881. 2 London Legal Observer, (Monthly,) 89, 41.

(b) In this case, it was proved that the boy's teeth had been dug out of his head in a most barbarous manner, and sold to a dentist for twelve shillings. *Id.* 44. See also the more atrocious Scotch case of *Rex v. Burke and McDougal*, A. D. 1828; where several persons had been systematically murdered for the purpose of making sale of their bodies. Celebrated Trials, (Phil. 1885,) 424.

(c) A fact very strongly illustrative of this propensity, is mentioned by Mr. *Wheeler*, in the preface to the first volume of his "Criminal Cases." During the prevalence of the yellow fever in the city of New-York, in the year

Another form in which murder is committed for the sake of immediate gain, is where the property of a person has been, by the force of circumstances, brought under the control or within the reach of another; and nothing but the life of such person prevents its passing entirely into the other's hands. If, by the force of the same circumstances, or by actual contrivance or artifice, the *person also* is brought within reach, a motive of great force is presented, to attempt the removal of the obstacle by criminal means. In the case of *Rex v. Burdock*, (a) an elderly lady, possessed of some property, had gone to live with the prisoner, who kept a lodging-house. Being taken unwell, and attended by the prisoner, the cupidity of the latter was excited so strongly, as to induce her to administer poison in some gruel which she prevailed on her lodger to take, and which resulted in death. The change which was observed soon after, in the prisoner's life and habits, showed that the death had been to her a lucrative event; and, on the evidence of this and other cogent circumstances, she was convicted and executed. In the case of *Rex v. Patch*, (b) the prisoner, who boarded with his employer, had been enabled, from his relations to the latter, to obtain, to a considerable extent, the control of his business, and was endeavoring to secure it permanently, by a course of fraud. His plans being in danger of frustration by the vigilance of his employer, he was tempted to put the latter out of the way, which he did by shooting him, one evening, as he sat in his

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1822, vast quantities of property in the lower part of the city, were left unprotected; the opinion prevailing throughout all classes, that that part of the city was infectious. To such a height had this opinion risen, that the owners of property refused to expose themselves to the danger of going to it; yet extensive and continued robberies took place in the district, in which was not only exhibited a contempt of death, but a wanton and useless destruction of valuables that could not be carried away. 1 Wheeler's Crim. Cas. Pref. p. 12 (1828.)

(a) Tried at Bristol, April, 1835. Best on Pres § 196.

(b) Surrey Spring Assizes, 1806; Wills, Circ. Evid. 230.

parlor. The crime, in this case, seems to have been induced by the double motive of the desire of gain, and the fear of detection.

In the late New Jersey case of *The State v. Peter Robinson*, (a) the deceased was a creditor of the prisoner, and held a bond and mortgage on his house, together with a policy of insurance on the premises, and also a promissory note made by the prisoner. The latter was in straitened circumstances, and the prospect of his being able to pay off the mortgage was so faint, that, according to his own statement, it was currently said, the creditor would eventually have his house. In this state of things, he seems to have conceived the idea of taking his creditor's life, under circumstances which should, at the same time, place him in possession of all the papers; hoping, by this means, to destroy all evidence of the debt. The requisite opportunity for committing the crime was obtained by decoying the creditor to his house, (then unfinished and occupied by no one but himself,) under the pretence of a settlement. The body was carefully concealed under the front basement floor of the house; but the display foolishly made by the prisoner of the fruits of his crime, (which consisted not only of the coveted papers, but of a watch and a considerable sum of money,) and the sudden visible change in his circumstances, led to an investigation which resulted in fixing the guilt of the murder upon him, in the most conclusive manner.

The other class of objects, which have power to excite, by a more indirect influence, the motive of mere gain, consists of those which present some substantial benefit, in the shape of advancement in life, promotion in business, or succession to property, as the result of the offence contemplated. A person believes that, on the death of another, he will, by the force of circumstances, obtain possession of his property

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(a) Middlesex (N. J.) Oyer & Terminer, March, 1841. Pamphlet Report. p. 15.

or business, or some portion of it; or he positively knows that, on the event of such death, he will, by law, succeed to his estate, or obtain some considerable benefit from it. Such death, to a party so circumstanced, is, obviously, a lucrative event, which, to a mind unrestrained by moral principle, becomes, in time, from the effect of constant contemplation, a desirable, and ultimately a desired event. At this stage, a strong motive is presented to hasten such event by means within the party's power, and this has led to some of the most flagitious cases of murder on record. (a) In the much discussed case of *Rex v. Donellan*, (b), it was a fact relied on, as indicative of a motive, that, on the death of Sir *Theodosius Boughton* (the person alleged to have been poisoned,) before arriving at age, a considerable estate would have descended to the prisoner's wife. In the case of *Rex v. Blandy*, (c) the commission of the crime seems to have been instigated by a similar hope of realizing a large sum of money, in the event of the death of the prisoner's father; although it was apparent that other motives had an auxiliary, if not a paramount influence. In the American case of *Commonwealth v. Hauer* and others (d), the murder of two persons, brothers, was attempted, and that of one accomplished, with a view to the benefit which would, in case of their death, accrue to an only sister, the wife of one of the prisoners. But in this case, also, the commission of the crime seems to have been instigated, in a considerable degree, by the passion of revenge.

In some cases, the motive of gain may present itself to the mind, as an inducement to the crime of murder, in the negative form of the avoidance of a supposed loss. The

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(a) See the German case of *Gesche Margarethe Gottfried*, 4 London Legal Observer, 101.

(b) Gurney's Report, 1781. Celebrated Trials, (Phil. 1835,) 111, 121.

(c) 18 State Trials, 1117, 1154.

(d) 2 Chandler's American Criminal Trials, 354, 355.

disposition to save expenditure is often as strong, in some natures, as the desire of positive acquisition. Hence, where a person stands in such a relation to another, as to be obliged, against his inclination, to assume the maintenance of the latter during life, a motive of equal strength with any that have been enumerated, is obviously presented, to shorten the period of expenditure, by criminal means.

It remains to consider, in the next place, that class of motives which have for their end the gratification of unlawful *passion*. These constitute a most fruitful source of crime, especially of the atrocious offences of murder, mayhem, rape and arson : and the motives are found to assume various shapes, according to the character and disposition of the criminal, and the circumstances of the case. In murder, the moving cause sometimes is *hatred* of a person who stands in the way of unlawful gratification, or an uncontrolled desire to remove an object once loved, but which has come to be viewed with dislike and detestation. An adulterous wife, at the instigation, or with the aid of her paramour, (*a*) is induced to destroy her husband. (*b*) A husband, who has formed a connection with another woman, (*c*) or who has been compelled to marry, or to support the wife whom he has abandoned, (*d*) is tempted to rid himself of what he feels to be an incumbrance. (*e*) A daughter, finding her father's wishes an obstacle in the way of union

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(*a*) Mrs. *Arden's* case, 5 London Legal Observer, 59. Mrs. *Spooner's* case, 2 Chandler's Am. Crim. Trials, 3. *Rex v. Nairn and Ogilvie*, 19 State Trials, 1285.

(*b*) In *G. M. Gottfried's* case, the murderess seems to have acted upon the unaided suggestions of her own mind. 4 Lond. Leg. Obs. 89. 90.

(*c*) *John Adam's* case, 11 Lond. Leg. Observer, 415.

(*d*) *The People v. Kesler*, 8 Wheeler's Crim. Cases, 18, 88. *The People v. Williams*, New-York Oyer & Terminer, May, 1854.

(*e*) *The People v. Green*, Rensselaer Oyer & Terminer, July, 1845; Pamphlet Report.

with her lover, is led on to perpetrate the crime of parricide. (*a*) . A seducer seeks, in this way, to shake off the annoyance of his victim, (*b*) or to rid himself of the reproach of his associates. (*c*) Sometimes, the motive is resentment or *revenge* for some injury, fancied or real. A favor has been withheld ; (*d*) an expected advantage intercepted ; (*e*) a supposed right interfered with ; a petition disregarded ; (*f*) a profligate son has been disinherited ; (*g*) a lover discarded in favor of another ; (*h*) an unworthy servant discharged, (*i*) or reprimanded or thwarted in some object ; (*j*) a debtor has been harshly accosted, (*k*) or sharply proceeded against, by his creditor ; (*l*) a cause has been lost by the decision of a judge. (*m*) In such cases, although no real or legal right has been invaded, the offended party chooses to consider himself aggrieved ; and, in failure of other redress, or disdaining such redress, where it may have been provided, deliberately constitutes himself his own avenger. The same motive often operates, and to the same end, where the supposed injury has been done to a friend or relative.

In most of the cases which have just been mentioned, the

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- (*a*) *Rex v. Blandy*, 18 State Trials, 1117.
  - (*b*) *Riembauer's case*, 8 London Legal Observer, 242.
  - (*c*) *Rex v. Richardson*, Burnett's Crim. Law, p. 524 *et seq. Ante*, p. 248.
  - (*d*) *Rex v. Harrison*, 12 State Trials, 838.
  - (*e*) Major *Strangways' case*, 5 Lond. Leg. Observer, 91.
  - (*f*) *Rex v. Bellingham*, Celebrated Trials, (Phil. 1835,) 481.
  - (*g*) *Rex v. Standsfield*, 11 State Trials, 1871.
  - (*h*) *Commonwealth v. Fuller*, Lawrenceburg, (Indiana,) Circuit Court, March, 1820. 2 Wheeler's Crim. Cases, 228.
  - (*i*) *The People v. Beehan*, Suffolk (N. Y.) Oyer & Terminer, October, 1854.
  - (*j*) *Regina v. Courvoisier*, Burke's Trials, (Aristocracy,) 461, 462, 468.
  - Rex v. Simmons*, Celebrated Trials, 57. *The People v. Beehan*, *ubi supra*.
  - (*k*) *Commonwealth v. Webster*, Bemis's Report, 565, 566.
  - (*l*) *Regina v. Rush*, Burke's Trials, (Upper Classes,) 458. *The People v. How*, 2 Wheeler's Crim. Cases, 412.
  - (*m*) *John Chislie's case*, 9 Lond. Leg. Observer, 186.



criminal motive is found to act upon the mind with comparative slowness ; or rather, the purpose matured under its influence is cherished for a length of time, and only put in execution when a desired opportunity has been met with. The impulse which would lead to immediate action is resisted or avoided, as tending to hazard the accomplishment of the object in view. Hence the crime, perpetrated under such an influence, is popularly said to be committed "in cold blood."

There is another class of cases of homicide in which the act may be traced to the same essentially revengeful motive, though from the rapidity with which it impels the mind to its gratification, unchecked even by the most obvious considerations of interest, the affinity is not always observed or regarded. The motive here is the mere impulsive desire to strike, without the least regard to consequences, at whatever thwarts the humor, offends the feelings, or opposes the action of the criminal. It is marked by a seeming determination to gratify the utmost extremity of passion, though at the instant and obvious cost of another's life. There is equal malignity of temper in this, as in the last description of cases ; the only difference being that it rules the mind for a shorter period. The intensity with which the object of passion is hated is, indeed, for the moment, greater ; it is actually absorbing, wholly excluding all other considerations. The motive, under this modification, has led to the commission of some of the most appalling crimes on record.

The common origin of both the classes of motives which have just been considered,—desire of unlawful gain, and gratification of unlawful passion,—in essential *selfishness* of heart, has already been alluded to. In one point of view, indeed, they actually have qualities in common. The murderer or ravisher, who seeks the gratification of his passion, finds in such gratification, *a gain* ; and, on the other hand,

the robber, whose ruling inducement is cupidity, is always influenced by a general *malignity* of purpose, which carries him through the act, with the most reckless disregard of its consequences to others. But, so far as the idea of gain involves those of the actual acquisition of any coveted object of value, or any substantial outward benefit, the two classes of motives are often in strong and perfect antagonism. The assassin who kills out of the mere desire of revenge, absolutely scorns the idea of plunder; and has often been known to leave untouched the gold he knew his victim had about him. And even where it is clear that no benefit whatever is to be realized from the criminal act, but, on the contrary, much loss and evil hazarded, the same revengeful impulse is nevertheless obeyed to its fullest extent. The power of this motive is indeed so overwhelming, as to neutralize the influence of all restraining motives, to swallow up the most obvious considerations of self-interest, and to render powerless even the great natural instinct of self-preservation. The sanguinary purpose being accomplished, the perpetrator is often so regardless of his own safety, as to make no attempt to escape; nay, will sometimes voluntarily surrender himself to justice, and, not unfrequently, is found to avow the deed, and glory in it. Or, anticipating the action of the law, he deliberately takes his own life, with the same weapon which he has used upon his victim.

Hence the fallacy of that course of reasoning by which, in cases of great enormity, the effect of *motive*, as a circumstance to prove crime, is sought to be avoided by bringing it to the test of mere *gain*, in the absolute sense of the term. In the face of a combination of facts, indicating, or capable of indicating the true motive of a murder, for instance, it has sometimes been argued that the act supposed to have been contemplated by the accused, could have resulted and did in fact result in no real benefit to himself; that the

supposed ulterior object of it could never be effectually attained ; that, on the other hand, the risk of detection was great, and the consequence of detection sure to be the forfeiture of life and character by an ignominious punishment. But it is abundantly proved by constant observation that it is of the nature of crime to overlook consequences, if not to scorn them, where the desired object presents itself within apparent reach. (a) If the criminal ever really looks to the future with anything like apprehension, it usually is to see in it only a contingency which may not be encountered, or, if encountered, may be avoided by the aid of some fortunate and hoped for occurrence. In short, if consequences were uniformly regarded in their true light and allowed their true weight, crime would cease to be committed.

There is another class of offences—those of wanton, unprovoked injury to the person, or wanton destruction of property, where the individual or the owner is not known to the perpetrator,—in which the motive is peculiar. There is here no cupidity satisfied, for there is no material object, in any sense acquired ; nor can the act be considered one of revenge, for that arises out of the conduct of some known party. But the motive is, nevertheless, a compound of both the gainful and the malignant impulse ; springing out of the depths of a radically wicked nature, which indulges in outrage for its own sake, and in such indulgence finds a gain.

In what has thus far been said, the mind has been supposed to be tempted or impelled to crime by the influence of some single motive ; and such influence is often, in fact, the adequate cause of the greatest offences. But it not infrequently happens that *several* motives are ascertained

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(a) It has already been remarked, (*ante*, p. 286,) that where the motive to a criminal act is the mere desire of getting possession of some coveted material object, the temptation presented by the immediate prospect of such possession, often outweighs any consideration of possible or probable hazard, even of the loss of life itself, to be encountered in the criminal attempt.

to have been at work, embracing the two leading varieties of gain and revenge, which have been mentioned. Thus, in the case of *Rex v. Blandy*, (a) the motive of the prisoner, in poisoning her father, (so far as it can be extracted from the circumstances, for all criminal motive and even criminal intent were strenuously disclaimed,) appears to have been, partly to hasten an event on the happening of which a considerable property was expected, and partly to get rid of an obstacle to the gratification of passion. In the case of *Rex v. Patch*, (b) one motive appears to have been, to get possession, more effectually, of the business of the deceased. But the immediate, most urgent, and probably the ruling motive, was, to prevent the imminent detection of the prisoner's fraudulent contrivances for the purpose. In the case of *Regina v. Courvoisier*, (c) the leading or original motive of the prisoner was plunder, sharpened, however, into more immediate activity, by hatred of a master who had reprimanded and threatened to discharge him. In the late case of *Regina v. Rush*, (d) the motives were, first, the influence of a feeling of bitter animosity, which had been openly expressed; but, more immediately, a desire to render available certain forgeries which the prisoner had previously committed. (e) So, where a murder has been the joint act of several,—some planning or directing, and others actually committing it, for a stipulated sum,—the former may be actuated exclusively by the passions of

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(a) 18 State Trials, 1117.

(b) Wills, Circ. Evid. 280.

(c) *Id.* 241. See Burke's Trials, connected with the Aristocracy, 461.

(d) Burke's Trials, connected with the Upper Classes, 467, 469. *Id.* 491—498.

(e) See also the case of *Commonwealth v. Hauer*, and others, 2 Chandler's Am. Crim. Trials, 358. And see the late case of *The People v. Hendrickson*, Albany Oyer & Terminer, July, 1858. S. C. on error and appeal, 1 Parker's Crim. Reports, 396, 415, 416, 422.

hatred and revenge, while the latter are influenced solely by the expectation of the promised reward.. (a)

From the foregoing view of the nature and varieties of criminal motives, and the manner in which they influence the mind and impel it to action, it will be seen that they occupy a very prominent position among circumstances, considered as the elements or materials of evidence; constituting, in truth, the acknowledged source and spring of all criminal conduct. But as they cannot be made to appear, when not voluntarily divulged, in any other way than by the indirect, circuitous and often difficult process of inference from other circumstances, it becomes important to determine with accuracy in what cases it may be considered material or necessary to institute any formal inquiry into them. (b)

For this purpose, it seems sufficient to recur to the essential character of judicial investigation itself, which is always thoroughly practical, and deals, as it is called to deal, only with outward visible acts, and not with inward mental emotions and processes. Motives are made use of, like other evidentiary circumstances, not for their own sake, or from any views of speculative curiosity, but simply as means of arriving at the knowledge of an ultimate fact. They are resorted to, as elements of evidence, not from any supposed necessity of accounting for, or explaining the reason of a criminal act which has been clearly proved and fixed upon the accused, however strange or inexplicable such act may in itself appear; but from the important aid they always render in completing the proof of the commis-

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(a) See the celebrated cases of *Mrs. Arden*, in England, (5 Lond. Legal Observer, 59,) and *Mrs. Spooner*, in Massachusetts, (2 Chandler's Am. Crim. Trials, 8.)

(b) As to the necessity or importance of inquiring into the motives of a criminal act, see the observations of *Barculo*, J. in charging the jury, in the case of *The People v. Lake*, 1 Parker's Crim. Reports, 539.

sion of such act by the party charged, in cases where it might otherwise be thought to remain in doubt. With motives, in any speculative or psychological sense, neither the law, nor the tribunal which administers the law, has any proper concern. The outward *acts* of men are all that they profess, or are called upon to regulate, or to punish. (a) Even that form or condition of mental action, known as *intent* or *design*, which is so closely connected with the act as to accompany its perpetration, and is essential to give it its criminal character, is never formally inquired into, where the commission of the act, in its full legal import, is placed beyond doubt. It is, indeed, true that an evil design is necessary to constitute a crime; or, in the language of the maxim, *actus non facit reum, nisi mens sit rea*. (b) But it is equally true that, in cases like those just mentioned, the nature of the action is, *per se*, indicative of guilty intention,—*res ipsa in se dolum habet*. In other words, the law infers the intent from the act itself,—*animus ex qualitate facti præsumitur*. (c) The old maxim has here a very literal application,—*acta exteriora indicant interiora secreta*. (d) Where a man in his senses, deliberately plunges a knife into the breast of another, or strikes with a weapon which, he knows, must kill, the law does not stop to inquire into the intent, but justly infers it from the act itself, which shows, upon its face, a will or design to take life. (e) Much less does it attempt to go farther back in the inquiry, by seeking for the *motive* which may have originally prompted the act proved. In short, in cases of this decided description, the rule or presumption of law is unhesitatingly

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(a) Wills, Circ. Evid. 40.

(b) 8 Inst. 117.

(c) Wills, Circ. Evid. 48. 1 Stark. Evid. 81.

(d) 8 Co. 290, 291.

(e) 1 Greenl. Evid. § 14. See the observations of Harris, J. in his charge to the jury, in the case of *The People v. Robinson*, 1 Parker's Crim. Cases, 649, 655.

applied,—that every sane man is presumed to know, (and knowing, to intend) the natural and probable consequences of his own voluntary acts. (a) And that motives may be inferred from conduct, as well as conduct from motives, is a familiar principle in the law of presumptive evidence. (b)

There are cases, however, in which *intent* is made a necessary ingredient of crime, as expressly designated or defined by law, constituting, indeed, the essence of the crime itself; and in which, consequently, such intent must be made to appear by evidence, in addition to the proof of the external visible act itself, which it is required to qualify. (c) Assaults with intent to kill, to maim, to ravish, to rob, are offences of this description. The crime of larceny falls under the same division, it being expressly defined to be the taking of the goods of another, with a felonious *intent*, or with an intent to steal. (d) In certain cases of homicide, also, the intent of the accused is allowed to be taken into consideration, in determining the legal quality of the act proved. In some of these cases, indeed, the tribunal is not only authorized and required to look into the intent with which the act was committed, but to go still farther back, and inquire into the *motive* which prompted it. Thus, in the case of a homicide committed in a sudden quarrel, the law always inquires into the fact and degree of provocation given, such provocation being, in truth, the source of the motive which impelled the act. Supposing the actual motive to have been of the most urgent kind, namely, the impulse of self-preservation, the fatal blow being struck, and designedly struck, in protection of the party's life, placed, for the moment, in imminent and otherwise unavoid-

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(a) See *ante*, p. 47.

(b) 1 Stark. Evid. 29—31.

(c) *Id.* 30. See *The People v. Cochrane*, 1 Wheeler's Crim. Cases, 81, 85, and note.

(d) See Roscoe's Crim. Evid. 585—587, where the definitions are more fully given. *The People v. Maxwell*, 1 Wheeler's Crim. Cases, 163, 166—169. In

able peril; the law looks upon this favorably, and will allow it to prevail in excuse, or even in justification of the act proved. (a) Supposing again, the motive to have been the mere impulse of retaliation, (which, in some natures, is almost as instinctive as the one just mentioned;)—the law regards this with far less of favor. Within certain limits, as where the retaliatory act is proportioned in any degree to the act which provokes it, it will be taken into account, as an infirmity of nature, in the light of palliation or excuse. But beyond these, as where the blow is struck with utter carelessness of its disproportion to the provocation given, and utter recklessness of its obvious consequences, the motive assumes the quality of mere impulsive revenge, for which the law makes no allowance. (b)

Assuming it, then, to be material or important, (as it often is in cases of proof by circumstantial evidence, (c) that a motive for the criminal act charged upon the accused, should be sought for and inquired into, the next subject for consideration is the manner in which such motive is arrived at, or made to appear in evidence.

A motive, considered as a mental impulse, apart from all connection with outward things, is, of course, in its nature incapable of being precisely investigated, or made apparent to human view. Originating wholly within the breast of

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the offences of receiving stolen goods, and attempting to pass counterfeit money, the intent is also a material ingredient. Roscoe's Crim. Evid. 875. *The People v. Teal*, 1 Wheeler's Cr. Cas. 199. *The People v. Johnson*, 1 Parker's Crim. Reports, 584. *The People v. Gardner*, 1 Wheeler's Cr. Cas. 28. As to the intent in burglary and robbery, see Rosc. Crim. Evid. 865, 895.

(a) For the law on this subject, see Wharton's Law of Homicide, 211, *et seq.*

(b) For the law on this subject, see 1 Russell on Crimes, 518, *et seq.* *Id.* 580, *et seq.* Wharton's Law of Homicide, 168, *et seq.*

(c) See the observations of *Parker*, Circuit Judge, in *The People v. Green*, (1 Parker's Crim. Reports, 82,) and of *Barculo, J.* in *The People v. Lake*, *Id.* 539.



him who entertains it, it is always cherished in secret, and, unless voluntarily divulged, cannot be penetrated by any human power. But observation of the general course of human conduct, as influenced by natural passions, frequently furnishes the means of assigning motives to actions, with more or less of accuracy according to the case, and with sufficient certainty for the purposes of practical justice. A certain course of conduct having been, in repeated instances, observed to follow from the operation of a known motive, it is a natural and reasonable process, where similar conduct occurs anew for consideration, to assign to it the same or a similar motive. Or rather, by a reversed process, (which is the usual one,) where circumstances indicative of a motive, and competent to have created it, are found to have existed, the inference is, that the motive was actually excited, and being excited did actually influence and determine the mind in its action. (a)

A motive being always (as we have seen (b)) called into existence by the influence or attraction of some external *object*, whether a material substance, or a mere subject of thought, can be effectively reached only by inquiring after such objects. (c) And the course of inquiry differs, according to the distinction just indicated. If the external object be a material substance, capable of exciting the desire to possess it, such as money, plate, jewelry, and the like, the first inquiry is, whether such object has actually been presented to the mind through the sense,—whether the party suspected of the theft, robbery or murder, has actually seen the gold or the jewel which has been taken. Sometimes, the object of cupidity is presented by mere accident, without any previous knowledge of its existence, or any attempt to get it within reach. The common case of a person, in-

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(a) See 1 Stark. Evid. 27—31. *Id.* 24, note.

(b) *Ante*, p. 288.

(c) See 3 Benth. Jud. Evid. 184—186.

advertently or ostentatiously showing the contents of his purse or pocket-book, in the company of strangers, is a familiar illustration of this fact. In other cases, the payment of money may have been accidentally witnessed by the person whose cupidity is thereby called into action. In other cases, again, the object of desire may have actually been placed in his hands, by its owner. In the case of *Moses Drayne*, who was tried for murder in 1663, (a) a traveller stopped at an inn in Chelmsford, on his way to London, and previously to his retiring for the night, delivered his cloak-bag to the inn-keeper, telling him there was in it near six hundred pounds, and writings of considerable value. He was never seen alive afterwards, and reports were raised that he had gone abroad. About eight years after, (the inn having passed into other hands,) a skeleton was found buried in the back-yard, with obvious marks of a violent death; which, on investigation of the circumstances, was satisfactorily proved to be the remains of the missing traveller. The former landlord and his wife were arrested, but died previous to the assizes. The ostler, who was accessory to the murder, was afterwards tried and convicted. Here the large sum, so suddenly brought within reach, was an object confessedly adequate to excite the motive of unlawful gain, and doubtless did actually excite and stimulate it to the formation of the murderous design. There are other cases in which a sight of the coveted object is obtained by means expressly taken with that view.

If, then, it can be proved by direct evidence, that the object of desire, under whatever circumstances, was actually presented to the senses of the suspected or accused party, the source of an adequate motive will be established in the most satisfactory manner. Supposing, however, proof of this character to be impracticable, the next inquiry will be,

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(a) 5 London Legal Observer, 123—125.

was the position or situation of the suspected party such that the object *might* have been presented to his view. If it cannot be shown that the robber saw, or must have seen the gold, was he where he might have seen it? If proof be made to this point, the same conclusion, as to the presence of the object, will be reached by the indirect course of inference; and it will be more or less conclusive, according to the circumstances proved. If it can be shown that a person was in the same room where a quantity of money lay openly exposed, the probability being that he must have seen it, such will be the inference drawn, although it may be rebutted by circumstances shown in defence; such as that his sight was defective, or his presence momentary.

But however desirable such proof may be, it is by no means essential that the material object itself should be actually presented to the senses of the suspected person. The mere *belief* that such an object does exist at a certain place, or may be found in the possession of a certain individual, whether derived from the party's own reasoning, or from the actual information or report of others, will place the *idea* in the mind, with a force capable of arousing the motive as effectually as any exhibition to the *sense*. In many instances, this belief amounts to actual knowledge; and here we discover the source of the motive which leads to the robbery of banks, bankers, and other persons, known, from the nature of their business, to be in the constant receipt and possession of money. In other cases, it amounts to expectation, of a greater or less degree of strength, according to the case. An old woman, practising the art of a fortune-teller, and living in a solitary spot, is reputed to be possessed of certain articles of silver, and money. Such mere report or information will present inducements to robbery, and to murder as a means of accomplishing it. (a) A

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(a) *Rex v. Smith, Varnham and Timms*, Stafford Spring Assizes, 1818; Wills, Circ. Evid. 287.

farmer, returning from a market or fair, is supposed, from that single circumstance, to have money about him, and is waylaid, shot and robbed on the road. (a) A pedlar is assassinated on the highway, with a similar view. (b) In short, we here discover the grand source of nearly all the robberies, burglaries and thefts, which are committed, together with the murders perpetrated in aid or concealment of them,—the expectation of immediate material gain.

Another leading source of motives to crime, especially of those of the darker shades, is to be found in the peculiar *circumstances* of individuals, and the *relations* (natural or legal,) which they bear to each other. Supposing the relations existing between two individuals to be such, that, on the death of one, the other will immediately succeed by law to his estate, or experience some considerable pecuniary benefit;—the lucrative event in prospect, capable as it is of being accelerated by unlawful means, and constituting a prominent object for contemplation, is, doubtless, competent, under certain circumstances, of awakening the gainful motive to murder. (c) Supposing, again, that a particular relation, such as marriage, has been contracted with the expectation of realizing a considerable interest from the property of the wife's father, and that this expectation has afterwards been materially disappointed by the comparatively trifling amount given to the wife by will, and even the acquisition of this deferred to a future day;—the circumstances present elements capable of exciting either the motive of resentment or that of avarice, or possibly both in conjunction: the former being subject to be aroused by the disappointment sustained; and the latter to be awakened by the consideration that should the amount be realized through the wife, it would not, in case she lived, compensate for the intermedi-

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(a) *Rex v. Howe*, Wills, Circ. Ev. 234.

(b) *The People v. Wood*, Greene (N. Y.) Oyer & Terminer, November, 1853.

(c) *Rex v. Donellan*, Gurney's Report, 1781.

ate burden of her maintenance. (a) So, where the result of a contract is, that, in the event of the destruction of certain property by fire, a certain sum of money is to be paid by one of the parties to the other, the contemplation of this event may serve to excite the motive to arson, especially if the event have been made decidedly lucrative to the insured, in consequence of his own fraudulent acts or representations. (b) So, where the relations existing between two persons show the existence of a feeling of animosity on the part of one of them against the other, especially where it has been exhibited in the outward conduct of the former, and its effect manifested in the fears expressed by the latter, on the score of his personal safety; an adequate source of the revengeful motive to crime will often be indicated with great clearness. (c) And, in all these cases, considerable latitude is allowed in presenting evidence with the view of showing that the motive assigned did, in fact, exist. (d)

But, in tracing out a motive by the process just described, another element besides an object or a relation capable of exciting it, is usually to be taken into view. The power of such an object to awaken a criminal inclination or impulse, depends obviously, not only upon the quality of the object itself, but also upon the character of the *mind* to which it is presented or addressed. This is exemplified by daily observation of human conduct. In some persons, the habitual sight and handling of large sums of money excite no unlaw-

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(a) *The People v. Hendrickson*, Albany Oyer & Terminer, July, 1853. S. C. on appeal, in the Court of Appeals, January and March Terms, 1854. See the opinion of *Parker*, J. 1 *Parker's Crim. Reports*, 416, 422, 428.

(b) *Fern's case*, Surrey Assizes, 1803. 3 Benth. Jud. Evid. 188.

(c) *The State v. Curawan*, Pamphlet Report, 42, 46. *Mrs. Spooner's case*, 2 Chandler's Am. Crim. Trials, 19—21.

(d) See the opinion of *Parker*, J. in the Court of Appeals, in the case of *Hendrickson v. The People*, 1 *Parker's Crim. Reports*, 416, 428. It was held in this case, that the will of the father of the deceased was properly admitted in evidence, as bearing on the question of motive, and tending to show the existence of the motive assigned.

ful inclination whatever; in others, the accidental view or temporary possession of a trifling sum, begets an inordinate desire, ending in a determination to appropriate it. In some, the certain prospect of succeeding to a million, on the death of another, awakens not even a wish that such death might be unlawfully hastened; in others, the mere expectation of realizing an inconsiderable benefit in such an event, leads to the formation of a settled purpose to accelerate it. In both these descriptions of cases, the object presented is of precisely the same general character, and it is presented in the same relative point of view; yet, in the former, it utterly fails to influence the mind even transiently, and as an abstract idea; in the latter, it takes full possession of it, and impels it to immediate action. The cause of this marked difference is the simple circumstance that, in the one description of cases, the mind is fortified against evil influences and impressions, by the force of correct moral principles and habits; in the other, it has either been left without such restraints, or has actually and voluntarily renounced their control. All this is matter of familiar observation, in the common affairs of life.

In judicial investigations of crime, the dependence of motive upon moral character is recognized, and has often been declared. On the trial of an important criminal case in this state, (a) the presiding judge expressed himself, in his charge to the jury, as follows. "It is claimed generally, that the motive is inadequate; that it is not sufficient to induce to the commission of murder. But all this must depend on the peculiar circumstances of each case, and the

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(a) *The People v. Green*, before *Parker*, Circuit Judge, Rensselaer Oyer & Terminer, July, 1845. Pamphlet Report, p. 46. S. C. 1 *Parker's Crim. Reports*, 11, 32. See also the opinion of the same judge in the Court of Appeals, in the case of *Hendrickson v. The People*, March Term, 1854. 1 *Parker's Crim. Rep.* 416, 423. And see the observations of the Lord Advocate, on the trial of *James Stewart*, 19 *Howell's State Trials*, 179.

peculiar character of the accused. There is no motive which, to the mind of an honest man, can be adequate to the commission of crime; and just in proportion as the mind is debased and immoral, to that extent the motive may be less which induces the criminal act. Hence there can be no one rule for all cases, as regards adequacy of motive. It must depend on the moral character of the person accused, in each case. The worse it is, the less the motive which will tempt to the commission of crime." (a)

In reference to the influence of the motive of gain, in particular, the following remarks of an acute writer on evidence may be here introduced. "In the natural course of things, where there is any property, every child has something to gain by the death of a parent. But, upon the death of a father, no one is ever led by any such consideration, to look to an act of parricide, in the first instance, as the most probable cause of the death." (b) The reason of this is that the natural relation existing between the parties furnishes, of itself, a general presumption of character, which repels, in advance, any such suspicion. But this presumption may be so far met and overcome by express evidence of character in particular cases, as not only to suggest the consideration of the motive just adverted to, but to give it material weight and prominence. In the case of an unprincipled daughter, for instance, like *Mary Blandy*, there would be no hesitation in assigning to evidence of such a motive, its full share of influence in establishing a conclusion of guilt.

Hence it is always considered important to present the moral character of an arraigned prisoner in a favorable light before the court and jury, by evidence adduced expressly for the purpose, in order to disprove the existence

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(a) The particular subject of the adequacy of motives will be more fully considered in the sequel.

(b) 3 Benth. Jud. Evid. 187, 188.

of a criminal motive, or to rebut evidence of it. The counteracting influence of character is also sometimes inferred and insisted on, by way of argument, (where no evidence is offered,) from the elevated social position or well-known mental attainments of the party accused. More will be said on this subject hereafter.

But with all the lights which outward and ascertainable circumstances are competent to throw upon researches into the motives to crime, there is frequently great difficulty experienced in arriving at a conclusion as to the real motive to the particular offence under investigation. This arises, as already intimated, from the nature of the subject itself; the mental operations which it involves being wholly inaccessible to actual inspection. The attending circumstances under which an object capable of exciting a motive is presented for contemplation, and the peculiarities of mental constitution itself, have, no doubt, in some cases, considerable influence in creating a motive to action, or in modifying its operation. These qualifying influences are often so subtle and remote, as to elude all observation. Hence it may happen that circumstances which apparently present powerful motives to action, may never, in fact, have operated as such. (a) And, on the other hand, the real motive may have grown out of circumstances apparently inadequate, and so trifling as to have been quite overlooked in the investigation.

Difficulties of a similar kind may also be encountered in cases which present what has been termed an *election* of motives; or, in other words, where an action is of such a character, that it may be equally well accounted for by the supposition of different motives,—the one being of a less criminal complexion than the other. A wound, it has been said, may have been malignantly inflicted, either with the in-

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(a) Wills, Circ. Evid. 39.



tention of killing, or of doing some injury short of death. (a) The question in these cases, however, is more properly one of *intent* or design, than of *motive* in the strict sense of the latter term. (b) But, adopting either signification, such a question can properly arise only in cases where there is equal probability of the one or the other supposition being true. The mere possibility, that the act *may* have been the result of a less criminal motive than the one which the accompanying circumstances reasonably indicate, would hardly be sufficient to raise such a doubt as to give the accused the final benefit of it. This would open the door to endless conjectures, and convert the simple course of judicial investigation into a labyrinth of metaphysical subtleties and idle casuistry. In fact, it is upon this very ground of electing the motive or intent, or repudiating the one imputed, that criminals constantly entrench themselves, in the most resolute and persistent denials of guilt. The commission of the criminal act being placed by the evidence beyond a doubt, the prisoner falls back upon his motives and intents. He retires into that invisible region,—the precincts of his own mind,—where he knows he cannot be effectually pursued. He chooses to say what was his motive or intent in doing as he did, or possibly he disclaims the existence of any motive. True, it is proved that he fired a loaded pistol or carbine at the head or body of the deceased, while in a defenceless state, and killed him on the spot. But he chooses to say that he intended only to frighten him, (c) or to inflict a

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(a) Wills, Circ. Evid. 41.

(b) See *ante*, p. 283. Some of the illustrations which follow, refer, it will be seen, rather to the *intent*, than the motive of the act inquired into.

(c) This was the excuse offered in the case of Major *Strangways*, in the face of proof of bitter animosity, and actual threats against life; and although the murderous weapon was loaded with two bullets and a slug, and so accurately aimed through a window partly shaded, that both the bullets struck the deceased in the head and instantly killed him. *Burke's Trials*, connected with the Upper Classes, 27.

light flesh wound, by way of punishment. (a) And who, he may think, can positively show that he did not so intend. Nay, he sometimes goes the length of repudiating any criminal motive whatever; insisting that there was every inducement in the case to do the reverse of what he did. (b) In the celebrated case of *Mary Blandy*, the prisoner had caused the death of her father by a course of poison administered by herself, at various times, and had witnessed, without compunction, the alarming symptoms and acute sufferings produced by it. When arraigned for the murder, her defence was that she did not intend to take her father's life; and in this defence she persisted at the place of execution. (c)

Judicial investigation is relieved from the subtleties involved in these mere assumptions of possible motives and intents, where acts are apparent, by that sound and most salutary rule of law already referred to, and which the safety of society requires should on all occasions be vigorously upheld;—namely, that *every accountable human being is presumed and bound to know the natural consequences of his own voluntary acts*. Where a man strikes at the head of another with a weapon which, in its nature, must produce death, and which accordingly does produce it, (the act not being done from any urgency of self-preservation,) he will not be permitted to say that he did not mean to kill, or that he did not suppose that the blow would kill. Death, under such circumstances, is the natural, (not to say, the inevitable) consequence of the stroke; and with knowledge of this fact

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(a) See the trial of *Earl Ferrers*, A. D. 1760; 19 State Trials, 919.

(b) See the case of *Rex v. Nicholson*; Celebrated Trials, (Phil. 1885,) 467, 473, 474. See also the case of *The People v. Hoare*, New-York Oyer & Terminer, November, 1858.

(c) This, too, was in the face of proof of expressions indicating the most unnatural hatred of a parent whose affection for her, even while suffering from the poison, amounted to weakness; and of other expressions showing that his death within a limited period was contemplated. See 18 State Trials, 1148, 1151, 1154, 1161.

the law itself expressly charges the party, and will not allow him to say what he did or did not suppose, in regard to the result. Again, where a man kills another by firing at his head with a gun known to be loaded with ball, or by administering a known poison in sufficient quantity to produce death; he will not be tolerated in alleging that he did not think the shot or the poison would kill; or that he relied upon some undefined possibility that the weapon might miss fire, or the natural and ordinary effect of the poison be repelled by the constitution of the deceased.. This would be allowing human life to be sported with, upon mere speculation. Indeed, supposing that at the time when a person administers poison to another, he actually does not know its nature or operation, or administers it for some supposed innocent purpose; if its virulent effects are at once perceptible in the alarming sickness and violent suffering which it produces, such result being sufficient to put him on inquiry as to the nature of the substance, the law will charge him with requisite knowledge; and, if he persists in administering it, will hold him criminally responsible for the result. And, even if the substance were sent by another person, (except perhaps, in the single case of a medicinal prescription, honestly intended,) if there were any thing in its appearance, calculated to excite suspicion, such as its close resemblance, in color, odor or other property, to any common known poison, it would be his obvious duty to test its qualities before administering it, or to administer it in quantities so small as to obviate the hazard of fatal consequences.

Upon grounds of this kind, in addition to the more positive evidence of a criminal motive, the conviction in the case of *Mary Blandy* may be thoroughly sustained and justified. In that case, the poison, which proved to be arsenic, had been sent to the prisoner by her lover, with the assurance (as she stated,) that it was a harmless substance, and that the effect of administering it would be to overcome

her father's hostility to their union ;—in other words, that it was intended as a mere *love-powder*, and that she believed it to be such, and administered it with a corresponding view. That she could have believed this tale, seems scarcely possible, considering the education she is said to have possessed. But supposing the fact to have been as she asserted it, the result of the first administration of the powder was sufficient to have put any right-minded person,—to say nothing of a daughter,—upon instant inquiry into its character. Instead of this, she continued to administer it from time to time, its effects becoming more and more obvious and virulent, until death was the result.

Important light is often thrown on investigations of the motives which may have led to a crime, or of the particular intent with which the criminal act may have been committed, by the conduct of the accused himself on other occasions. Thus, where, upon a charge of maliciously shooting, it was questionable whether the act had proceeded from accident or design ; the circumstance that the prisoner had intentionally shot at the same person, about a quarter of an hour before, was allowed to be shown in evidence, in order to establish the motive. (a) So, upon the trial of a man for the murder of a woman, by administering to her prussic acid in porter, evidence was admitted that the deceased had been taken ill, several months before, after partaking of porter with the prisoner : the court saying, that, although this was no direct proof of an attempt to poison, the evidence nevertheless, was admissible, because any thing tending to show antipathy in the party accused against the deceased, was admissible. (b) On the same principle, as has already been observed, where a person has been charged with passing counterfeit money, knowing it to be such, the circumstance that the accused had, shortly before, passed or attempted to

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(a) *Rex v. Voke*, Russ. & R. Cr. Cas. 658, [581.]

(b) *Regina v. Turrell*, Aylesbury Spring Assizes, 1845; Wills, Circ. Evid. 44.

pass *other* counterfeit money, will be allowed to be shown in evidence, in order to establish the requisite guilty knowledge or intent. (a)

Supposing, however, that there are no difficulties in the way of investigations of the kind just considered; and that there are particular circumstances, capable of being shown in evidence, which appear to present a motive to the criminal act charged, the next subject for consideration is the weight and value which are to be attached to such evidence.

This will generally be found to depend upon the *connection* existing between these facts, and others of a criminative character belonging to the same body of evidence. Taken by themselves, they would be allowed no great weight, but, as corroborative elements in a mass of circumstantial evidence, they may be decisive. Looking, for instance, at the motive of pecuniary gain, the mere fact that a person stands in such a relation to another as that he would gain a material advantage by his death, however clearly it may be shown, is not in itself sufficient to charge him with having been the cause of such death, where it ensues, and is found to have been the result of unlawful means. (b) But, as tending to confirm the conclusions derived from other facts of a criminative character, the existence of such a gainful motive becomes of great importance. So, in a case where a person has been charged, under circumstances of great suspicion, with having set fire to his own shop, warehouse, or dwelling, the fact that he had, shortly before, insured it to an amount greatly exceeding its value, is a material, if not a decisive circumstance against him. (c) The importance of evidence of character, in connection with that of motive, has already been adverted to.

The existence of a motive has been considered by most

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(a) See *ante*, p. 157.

(b) Best on Pres. § 88.

(c) *Fern's case*, Surrey Assizes, 1803. 3 Benth. Jud. Evid. 188.

writers on circumstantial evidence, to be not so properly a *criminative* circumstance, as one removing the improbability of the individual's having done an act the effect of which would be to subject him to punishment. (a) In other words, its proper office is held to be, to create a counterpoise to the inducement to abstain from crime, which is supposed to be the general or natural effect of contemplating the penalty annexed to its commission. (b) But this idea, however correct in the abstract, does not affect the propriety of regarding motives, as elements of judicial evidence, in a strictly and positively criminative point of view. In one sense, the effect of *all* judicial evidence is to counterpoise and weigh down the anterior presumption of innocence, with which the juror enters, and is required by law to enter, upon the duty of investigation. But this does not affect the positively criminative character of the evidence itself. So, motives may justly claim to rank at the head of positively criminative circumstances. In them, the very sources of crime are laid open to view; and, in developing them by evidence, the first step (in the natural order of inquiry,) is taken in the process of criminating the party who is arraigned for trial. Hence the pains constantly taken by advocates for the prosecution, to present, in the first instance, and as a part of the case to be proved, evidence from which the jury may infer the existence and operation of a criminal motive on the part of the prisoner.

What has thus far been said may suffice to show how a motive to a crime charged may be affirmatively made to appear from circumstances in evidence, with a view to criminate a particular individual accused of its commission. But the subject cannot be dismissed without some reference to the course which may be, and constantly is adopted, in the

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(a) *Id.* 188, 184. Best on Pres. § 232. Wills, Circ. Evid. 40.

(b) The subject of conflicting motives, with their eventual results, will be considered on a subsequent page.

way of defence, on behalf of the accused, founded on the alleged *non-existence* of any motive to the particular crime charged, or the *insufficiency* of the particular motive assigned, to have led to it. The present section will therefore be closed with a brief view of the course of defensive argument, so far as it is drawn from the sources just mentioned, together with some notice of its soundness or sufficiency, and the extent to which it serves to qualify the views which have already been presented.

As the prosecutor, in the arrangement and presentation of his evidence, endeavours to satisfy the tribunal that the criminal act charged was actually committed by the prisoner, by showing, among other circumstances, that there was a motive for its commission; so the advocate for the accused, on his part, seeks not only to disprove the fact itself, but also the existence of any motive as its cause. Indeed he often addresses himself specially to the latter object, and, through it, endeavours, virtually, if not in form, to accomplish the former; the argument employed being, in substance, this,—that, as acts flow from motives as their sources, and every act must have its motive, the non-existence of the motive involves that of the act itself; the relation relied upon being that of cause and effect.

To consider the course of defensive argument as to motive, more particularly, it will be found to assume various shapes, according to the nature and degree of proof made out on the part of the prosecution. If no evidence of a motive to the crime charged have been affirmatively presented, this failure of proof is relied on for the accused: and, in cases where the fact of guilt itself is, upon all the circumstances, *doubtful*, it is usually relied on with success; the absence of all evidence of an inducing cause to guilt always affording, in such cases, a strong presumption of innocence. But if there be no room for doubt of guilt, upon all the circumstances shown, (as where the evidence is of

the certain kind,) it will avail nothing for the defence that no motive appears, or has been affirmatively shown by the evidence adduced. As the law will allow the inference of intent from the quality of the act itself, where its commission is manifest; (a) so, from an intentional act satisfactorily proved, it will allow the inference of a motive: intent implying nothing more than a certain state of mind or will, as motive implies a certain state of feeling or disposition, anterior to the former and operating as its cause. Indeed, in cases of this manifest description, the very existence of the relation of motive to act, as of cause to effect, upon which the accused attempts to rely, becomes an argument against him. For, admitting, as a general truth, that every act must have its motive, it is an obviously necessary inference (independently of any conclusions of law,) that the act proved in the particular case *did* have its motive. It is enough, therefore, to assume that the apparent act had a corresponding motive. To go further, and single out *the* particular motive which was the actual inducing cause, as it would be manifestly impracticable, is never necessary. (b)

In cases of extraordinary atrocity, where the commission of the crime has been clearly proved, the assumed absence of any motive is sometimes relied on, in behalf of the prisoner, for the purpose of showing that he was not, at the time, in the possession of his reason, and therefore not a responsible agent. On this point, it has been well remarked by the presiding judge, in charging the jury, in a recent criminal case in this state, (c) that "if a case should arise where it was *absolutely certain* that there was no motive whatever for the commission of the crime, it would undoubt-

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(a) See *ante*, p. 297.

(b) See the observations of Parker, Circuit Judge, in charging the jury in the case of *The People v. Green*, Rensselaer Oyer & Terminer, July, 1845. 1 Parker's Crim. Reports, 82.

(c) *Barculo, J.* in *The People v. Lake*, Duchess Oyer & Terminer, September, 1858. 1 Parker's Crim. Rep. 539, 540.



edly tend to show insanity, for insane persons are the only ones that act without motives. But who can say there is no motive? Who can fathom the mind of the accused, and ascertain that there is no hidden desire of vengeance, no envy or avaricious passion to be gratified?"

The argument, indeed, is sometimes pressed to the length of holding that there *could have been* no motive in the case; reliance being placed on the intrinsic improbability that any human being, possessed of reason, could have been influenced by any imaginable motive to commit the act. So far as an argument of this kind is employed in aid of evidence intended to establish imbecility or unsoundness of mind, it may be entitled to consideration. But, any further than this, it seems to be a purely speculative attempt to sound the depths of human depravity, and to assign arbitrary limits beyond which desire and passion are to be held incapable of seducing or impelling human nature.

Thus much as to the course of defence, where no particular motive to the crime charged is made out, or in any way indicated by affirmative evidence. Supposing, in the next place, that the existence and possible influence of a motive are shown, its intrinsic quality or impulsive power is next assailed, and the argument relied on is, that the supposed or assigned motive could not have been, in point of fact, *adequate* to the inducement of the particular act.

This question of the adequacy or inadequacy of motives to the production of their assumed results, opens an extremely wide field of inquiry; co-extensive, indeed, with that of the influence of external objects upon the emotions of the mind. Speculation might here be indulged without limit; but as speculation would be foreign to the professed object of the present work, the question just stated will be considered only so far as it is capable of being illustrated and determined by facts derived from actual cases, and considerations drawn from known rules of law.

The first ground of the argument against the adequacy of an assigned *motive* to have induced the commission of a crime charged, is the supposed *disproportion* intrinsically existing between them. So aggravated an offence, it is urged, could not have been committed for so insignificant a gain, or upon so trifling a provocation. But it has already been shown (*a*) that in order to estimate with any correctness, the inducing power of a motive to crime, or the want of such power, the moral quality of the mind to which it is addressed must always be taken into view. It is this quality indeed, which gives operative power to the motive itself, and often calls it into existence. "There is no motive," it has been well said, (*b*) "which, to the mind of an honest man, can be adequate to the commission of crime; and just in proportion as the mind is debased and immoral, to that extent the motive may be less which induces the criminal act. Hence there can be no one rule for all cases, as regards adequacy of motive. It must depend on the moral character of the person accused, in each case." In a very recent criminal case in this state, the presiding judge remarked as follows. (*c*) "There is no rule of law which determines what is an adequate motive, even where it is necessary to show one. One man will kill another to obtain a thousand dollars; another may do the same for a tenth, or even a hundredth part of that sum. In each case, it is adequate, in one sense, for the mind on which it operates. But in truth, and in another sense, no amount is fairly adequate to induce a reasonable man to take the life of another; nothing will induce a reasonable man to commit murder."

But, turning from argument to facts, the evidence recorded

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(*a*) *Ante*, p. 305.

(*b*) *Parker*, Circuit Judge, to the jury, in *The People v. Green*, Rensselaer Oyer & Terminer, July, 1845. 1 *Parker's Crim. Reports*, 32.

(*c*) *Barculo*, J. to the jury, in *The People v. Lake*, Duchess Oyer & Terminer, September, 1853. 1 *Parker's Crim. Rep.* 540.

in numerous actual trials serves incontestibly to show by how trifling and apparently wholly inadequate motives or causes, men *have been* led to the commission of the most appalling crimes. The mere expectation of obtaining a few pounds for a dead human body, as an anatomical subject, was sufficient to induce *Burke* and his associates to murder no less than sixteen persons. A few words of reprimand led *Courvoisier* to cut his master's throat, as he lay asleep in his bed. In regard to the motives of hatred and revenge, in particular, the following observations of the Lord Advocate on the trial of *James Stewart*, in 1752, are very appropriate. (a) "Nothing is more certain than that violent offence may be taken, where no just or even plausible cause for it hath been given : and, from the first murder recorded in sacred history, down to this now in question, often hath it happened that wicked men have hated their brothers without a cause, that is, without a reasonable or just cause ; although there was always an occasion or a motive, such as it was, for that hatred being conceived."

Another ground of the argument against the adequacy of assigned motives, in particular cases, consists in what may be called the *antagonism* or conflict of motives, or the assumed existence of *restraining* motives operating in an opposite direction. The principal sources of these are three ;—the penalties imposed by the law upon crime ; the force of the natural affections ; and the influence of the peculiar character and circumstances of individuals.

The penalties which the law, for the protection of society, imposes upon crime (and which have been called its "tutelar sanctions," (b)) are intended, by the loss and suffering which they hold out as its consequences, to deter men from its commission. These penalties operate, in the most accu-

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(a) 19 Howell's State Trials, 179.

(b) 8 Benth. Jud. Evid. 184.

rate sense, as *motives to restrain* (a) the mass of mankind, who are inaccessible to higher considerations, from giving the reins to criminal desire. The influence of these restraining motives is, by the form of argument in question, *set off* against that of the motives which seduce or impel, and the effect claimed is either wholly to neutralize and destroy it, or to reduce the resulting influence to that point where its inadequacy becomes apparent.

Of this argument, no less than of the preceding, it may be said, that it is encountered by actual facts; with this difference, that such facts are of daily occurrence. Notwithstanding the severity of the penalties provided by law, it is notorious that the commission of crime continues to go on. The restraint contemplated is not effectual to the extent intended and desired. A majority, perhaps, of what may be termed the criminally disposed portion of the community are kept in check by the effect of fear, or the natural desire of avoiding threatened loss or suffering. But a number, sufficiently large to give full employment to criminal tribunals, are still found, to whom the restraints of law interpose no effectual barrier to the gratification of criminal desire. In the minds of such persons, especially those who act from habit rather than impulse, there is doubtless, a frequent balancing of the two classes of motives against each other,—those which deter against those which induce; the loss threatened against the gain promised;—and if these were the only influences regarded, the preponderance probably would oftener lie on the side of *restraint* and consequent inaction. But, unfortunately for society, this otherwise probable result is, in fact, constantly weakened and overthrown by the presentation of a third class of motives,—those, namely, which involve the *chances of escape or immunity* from punishment. It will be sufficient to enumerate the

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(a) Hence they have been called by Mr. *Bentham*, “tutelary motives.”  
8 Benth. Jud. Evid. 185.

sources of these last mentioned motives, as they lie along the whole course of criminal justice, to show what a force they are capable of exerting in aid of the criminal inclinations by which men are so often swayed.

There is, first, the possibility of avoiding the discovery of the crime altogether, by the destruction, either of the subject itself, or of the evidence necessary to present it for the action of the law. Next, in the event of discovery, is the possibility or chance of escape from the pursuit of justice. Next, supposing apprehension to take place, is the possibility that the proof presented may fail to support the accusation. Next, supposing the charge affirmatively proved, is the possibility of rebutting it by counter-evidence. The next chance, supposing no effectual defence made out, is, in the discretion or possible sympathies of the jury, or the exercise of judicial mercy. And, last of all, is the possibility, expectation, or hope of escaping the extremity of punishment, through the interposition of executive clemency. (*a*)

But the influence of the class of motives, last named, and which may, in many instances, be regarded as the final or determining impulses to action, is to be discovered chiefly in those cases where *self-interest* is the great ruling motive of conduct, and in those minds which are less resolved and unyielding in their criminal purposes. The overwhelming power of the *vengeful* impulse, where it has obtained full mastery of the mind, has already been adverted to. In these cases, the chances of escape from threatened punishment, are rarely so much as transiently regarded, much less, accurately weighed. Even the apparent certainty of encountering the full penalty which the restraining motive,

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(*a*) It has already been remarked, that the possibility and even probability of encountering great bodily harm and even death itself, in the commission of a criminal act, often prove insufficient to counterbalance the force and urgency of the gainful motive, where the mind has become strongly impressed by it. The criminal, in these cases, deliberately takes the risk.

in itself considered, presents, fails often to affect the purpose which has been formed. There may be, at times, a balancing between the force which urges on, and that which holds back ; and, at such moments, as the criminal will often afterwards confess, the resolution may be actually shaken. But, in the extreme cases now in view, these states of possible indecision have long been surmounted and passed, and the mind has finally settled down into the fearful determination to consummate its purpose, at whatever cost. All regard for self is thenceforth voluntarily abandoned, life and all its interests deliberately sacrificed, and even the hopes of an hereafter renounced without remorse. Thus, the restraining motives of interest are seen to fail in their intended effect, even where they may have been once actually regarded and entertained. Where the revengeful impulse is of the sudden kind, and sweeps the mind passively onward, they are confessedly powerless to the last degree ; not being, even for an instant, present to the thought.

Another class of restraining motives, for which a controlling influence is often claimed in behalf of parties accused of crime, and particularly of murder, consists of those which arise from the influence of the *natural affections*. The peculiar personal relations existing between parties, especially the domestic relations of husband and wife, and parent and child, and those existing between brothers and sisters, are frequently relied on, in argument, as constituting restraining motives of the very strongest kind ; and sometimes, indeed, as forbidding even the supposition that the crime charged could have been committed. In the abstract, and in a general point of view, the power of the natural affections may well be relied on, to almost any conceivable extent. It is a natural presumption, and, indeed, a presumption of law, that these affections are the consequences and attendants of the relations in question ; that men are influenced by them, and that they act according to their

dictates, and not in violation of them. (a) But it is nevertheless true, that, in particular cases, too numerous, unhappily, for the credit of humanity, these affections have been found to interpose no sort of bar to the gratification of either the gainful or revengeful impulse to murder; or, to speak with more precision, that the affections presumed from the relations of the parties have not, in fact, existed. Cases of parricide, of fratricide, of the murder of children by their parents, of husbands by their wives, and of wives by their husbands, have continually stained the pages of criminal records down to the present day. (b) One case of pre-eminent atrocity may be particularized; where the criminal, in order to remove all obstacles to her union with a person for whom she had conceived a passion, poisoned, successively, her husband, father, mother, brother, and three young children; and on the refusal of such person to marry her, poisoned him also. (c)

The restraining motives hitherto taken into view, have been either of the grosser description, which speak directly to the sense of fear, and are applicable to the mass of minds

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(a) Domat's Civil Law, book 8, tit. 6, sect. 4, art. 7. See the opinion of Harris, J. in the case of *Hendrickson v. The People*, 1 Parker's Crim. Reports, 406, 415.

(b) The following statistics of crime committed during a single year (1854) in the United States, has been given in a New-York paper:—

Wives killed by their husbands . . . . .	36
Husbands by their wives . . . . .	6
Children by their parents . . . . .	21
Parents by their children . . . . .	8
Brothers by brothers. . . . .	5

[New York *Herald*, Jan. 10, 1855.]

(c) Case of *Gesche Margarethe Gottfried*, at Bremen, 1828. 4 Lond. Legal Observer, 89, 101. In the late case of *The People v. Lake*, (1 Parker's Crim. Rep. 539,) *Barculo*, J. in charging the jury, mentioned the case of a man tried before him in Brooklyn, (N. Y.) who stabbed, at the same time, his wife, mother, and sister, killing the two former on the spot. The argument that *insanity* is to be presumed in such cases, is well treated by the learned judge last named. *Id.* 538, 539.

criminally disposed ; or such as are derived from the influence of moral affections common to men under all circumstances. The last class of these motives which remains to be considered, includes those which are supposed to have their sources in peculiarities of individual character, or in those circumstances which distinguish one man or class of men from another. Among these, *moral character*, *mental endowments*, and *social position* are pre-eminent.

By *moral character* is here meant the possession, habitual practice and outward exhibition of those *principles* and that *disposition* which, united, serve most effectually to guard the mind influenced by them, from the seductions of the gainful motive to crime, on the one hand, and the impulses of the passionate or revengeful motive, on the other. Sometimes, these qualities are relied on singly, as showing the existence of a restraining motive of sufficient power to overcome the force of that assumed to be the peculiar inducement to the particular crime charged. Thus, on a charge of *theft*, a known character of unimpeached *honesty* ; on a charge of riotous *assault*, a known disposition of uniform *gentleness*, severally serve to raise the suppositions of improbability most appropriate to the defence in each case. But the union of both is requisite to present that completeness of moral constitution, which serves to give to the argument derived from character its fullest possible force, and to adapt it to accusations of all descriptions, including the most heinous. On a charge of murder, disposition (which may, for this purpose, be allowed to include physical temperament,) may be made to operate strongly in aid of principle, as showing the improbability that the accused could have yielded to the influence of the motive imputed to him.

*Mental endowments* and attainments constitute another source of those peculiar motives which are claimed to exercise over the subject of them, an influence more than ordinarily adequate to restrain from the commission of crime :



and, so far, competent to show the probable inadequacy of the opposite or impelling motive assigned. Of these it may be said, that, apart from all reference to moral qualities, they would hardly serve to guard the mind, on all occasions, from evil seductions and impulses, especially as they have been, not infrequently, found to exist in combination with utter destitution of moral principle. But, with this qualification, there is much, in the intrinsically elevating and ennobling tendencies of mental culture, to entitle it to peculiar consideration, as a source and means of defence against the influences which lead to crime. Especially is this the case, where the degree of culture attained considerably exceeds the ordinary standard. Refinement of tastes serves to place the mind, at once, above the influence of those sordid impulses which are involved in the gainful motive. Discipline of faculties enables it to cope, most successfully, with the stimulating power of passion; while mere extent of knowledge continually presents a host of reasons why the practice of virtue should be the constant aim of life. Besides, it is well known that ignorance sometimes lays perilous snares for innocence, which intelligence effectually avoids. In fine, the outward associations to which mental culture naturally leads,—the society of the wise, the good and the learned, into which it always procures admission for its possessor, and the varied connections growing out of it on every side,—serve to give double force to the restraining influences which have been enumerated.

Lastly, *station* or position in society presents another and very obvious source of restraining motives, growing out of peculiar circumstances. The influence of this circumstance has been supposed to be derived chiefly from the *opulence* which is considered to be habitually associated with it, and which places its possessor above the temptations to that class of crimes, which are prompted by the desire of unlawful gain, especially where the object of the supposed desire

is of inconsiderable value. (*a*) But this, certainly, is taking the narrowest possible view of such influence. It would, at least, be equally accurate to resolve it into a sentiment of aversion to any act involving, as its legal consequences, obvious dishonor and disgrace. In this, indeed, seems to reside its essential power, considered apart from other circumstances.

Where social or professional position is combined with corresponding moral and mental qualifications, its range of influence is proportionately enlarged ; and, where the degrees of excellence are high, they undoubtedly present a combination of circumstances which may well be regarded as incompatible with the supposition of unlawful indulgence of any kind.

Such are the sources of those motives which, by the form of defensive argument last noticed, are claimed to exert, or to be capable of exerting a peculiar counteractive influence, in resisting the force of the impelling or seducing motives to crime ; and, so far, rendering them presumably inadequate to the production of their more ordinary effects ; thus, on the whole, serving to demonstrate the improbability of the supposition of guilt or delinquency in the particular individual accused. But however strong the argument in this form may, in the abstract, be, it is always subject to the same practical consideration which has been applied to the other forms, already noticed ; namely, that restraining motives of the class in question, and of almost the highest supposable degree of power, *have, in point of fact*, proved wholly inadequate to resist the allurements of unlawful desire, or the cogency of malignant passion. The records of the criminal

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(*a*) Evidence of station has been considered by Mr. *Bentham* to be peculiarly adapted to render improbable charges of petty theft. " In any of the civilized nations of Europe," he asks, " what evidence would be sufficient to convict a prince of the blood, or a minister of state, of having picked a man's pocket of a dirty handkerchief, in a street, or in going into a play-house ? " 8 *Jud. Evid.* 210.

courts of all nations present melancholy examples, in which high social and professional position, great mental attainments, and even apparently pure moral character, have utterly failed as safeguards against the most revolting crimes. How frequently persons of *station* have abandoned themselves to murderous impulses, is shown by such cases as those of the poisoners of Sir *Thomas Overbury*, (a) Earl *Ferrers*, (b) Major *Strangways*, (c) Captain *Goodere*, (d) and others, in England; and by some appalling examples of recent date, in the United States. That the same circumstance has not availed to deter from the commission of gainful crimes of a high grade, is proved by such cases as that of Dr. *Dodd*, an English clergyman of high standing, who was convicted of forgery in 1777, and underwent the extreme penalty of the law. (e) The failure of mental attainments to hold successfully in check the murderous propensity, is signally instanced in the celebrated case of *Eugene Aram*. But the worst is yet to be stated;—the insufficiency, namely, of even seemingly high moral and *religious* character, to subdue unlawful inclination, in some of its most odious forms. Instances are not wanting, where individuals, outwardly belonging, and (at least outwardly) doing credit to that

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(a) 2 Howell's State Trials, 911, *et seq.*

(b) 19 *Id.* 885.

(c) 5 London Legal Observer, 90.

(d) 17 State Trials, 1008.

(e) Burke's Celebrated Trials, connected with the Aristocracy, 369. A very painful case of crime recently committed in England, by a clergyman and author, may be here mentioned. Dr. *John Allen Giles*, curate of Brampton, was tried before Lord *Campbell*, at Oxford Assizes, on the 6th March, 1855, for feloniously making a false entry of marriage in his parish registry. The accused was of great scholastic abilities, having been a double first-class man at Oxford, at the age of nineteen, and afterwards head-master of the city of London School. He was the author of many works, his labors having resulted in the publication of as many as one hundred and twenty volumes, and he had a high character given him by clergymen and publishers. But the case being clearly made out against him, he was convicted and sentenced to a year's imprisonment. English paper, quoted by the New York Albion, April 7th, 1855.

sacred profession, the whole aim and tendency of whose principles and duties are to purify the heart and life, and to wage an incessant warfare with the slightest promptings of sinful desire, have not only yielded to the impulses of the most malignant passions, but have actually run a course of crime not often paralleled. The assassination of Miss *Reau* by the Rev. Mr. *Hackman*, in 1779, (*a*) and the shocking career of the German priest *Riembauer*, (*b*) occur as prominent examples among others. Happily for the cause of virtue, the character, in most of these cases, was apparent and assumed, rather than real and vital; the life belied the profession; the source of guilt was not in the principles, but in the traitorous abandonment of them. For, of all the sources of restraining motives, ordinary or peculiar, which have been mentioned, none can compare, in fullness and certainty of effect, with those derived from correct moral principles, heartily embraced, and unswervingly adhered to.

What has just been said will serve to show how far the influence of a criminal motive may be considered to depend upon the peculiar character, (moral or intellectual) of the person subjected to it. Indeed, in order to estimate with correctness, the force of a motive in some instances, even the *habits* and *tastes* of the individual should be taken into view. The following may be given as an example. A person of wealth and standing is accused of having committed a theft of an article apparently (and perhaps, in the opinion of most persons, really,) of very trifling value. In defence, the gross inadequacy of the assigned motive is set up and relied on. Supposing the charge satisfactorily proved, the mind is still at a loss to conceive in what the peculiar force of the gainful motive could, in this instance, have resided. But the moment the fact comes to be known,

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(*a*) *Burke's Trials connected with the Aristocracy*, 898.

(*b*) 3 *London Legal Observer*, 242, 277. See also the recent case of the Rev. *G. W. Carawan*, in North Carolina.

that the delinquent was a virtuoso, a collector, an antiquarian,—actuated by all the ardor peculiar to that description of persons,—and that the article taken was one which commended itself to his peculiar tastes; the nature of the mental action is at once appreciated, and the adequacy of the motive becomes evident. (a)

On the whole, it may be observed respecting the argument against the influence of an assigned motive, from its apparent inadequacy, that it becomes most appropriate and effective in cases where, upon all the circumstances shown in evidence, the ultimate fact of guilt remains a matter of doubt. The character and circumstances of the accused frequently serve to strengthen, in a most material degree, that general presumption of innocence which the law itself always raises and upholds in his favor, until that stage of investigation when proof is said to be complete; and, to overcome it, a proportionately greater amount and cogency of evidence are always necessary. But where the evidence is full, and the fact of guilt manifest beyond a reasonable doubt, it is certain that neither character, nor station, nor any other similar circumstance, can be allowed to alter or affect the conclusion. (b)

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(a) See the illustration given by Mr. *Bentham*, in his peculiar manner, 8 Jud. Evid. 189. The tendency of certain mental pursuits, when indulged in to excess, to cloud the moral perceptions, was shown in the recent case of Dr. *Giles*, mentioned in a preceding note. The accused urged before the court, in extenuation of his offence, that his devotion to his studies had rendered him unfit for the common affairs of life; to which circumstance he attributed the errors he had committed in connection with the transaction in question.

(b) See the remarks of the Recorder of Bristol, in charging the jury, on the trial of *Samuel Goodere* and others; 17 State Trials, 1078. See also the remarks of *Parker*, Circuit Judge, to the jury, in *The People v. Green*; Pamphlet Report, 47. The value of character evidence will be further considered hereafter.

## SECTION V.

*Means of committing crime, as a subject of contemplation in connection with motives.*

The natural effect of a criminal motive, once excited in the mind, and voluntarily and complacently entertained, is the formation of a *purpose* of corresponding character; that is, a determination to adopt such a course of conduct as shall realize, in fact, the gratification of the passion or desire in which the motive consists. But this formation of a criminal purpose is always subject to the consideration that it is *possible* to be carried into effect. Willingness to do the act, if possible; expresses the state of the mind, at this stage of unlawful affection and influence. If it appear wholly impracticable, the incipient purpose is either at once abandoned, or deferred to some future occasion; and, supposing the influence of the mere motive to continue, the mind contents itself with simply cherishing the unlawful emotion, which thus frequently settles into what may be called habitual disposition. If, on the other hand, the object seem reasonably possible or attainable, the next inquiry is addressed to the particular means and facilities within reach, which can be made instrumental for its accomplishment. Hence, next to *motives* to crime, the subject of *means* properly occurs for consideration. The close connection between the two subjects is obvious. Indeed, means have, by some writers, been actually classed under the head of motives. "The belief," observes Mr. *Bentham*, "of the existence of whatever means are regarded as necessary to the production of the effect in question, being a condition precedent to the endeavour; *means* may in this case be considered as coming under the denomination of *motives*;

power being as necessary an article as desire, in the assemblage of productive causes." (a) Means, it is true, partake of the character of motives, so far as inducing power is concerned; but they differ in the essential particular of being addressed to the *reasoning* faculties, and have no quality of mere *emotion*, which is of the essence of motives. The ascertainment of the existence of adequate means, involves processes of investigation and calculation more or less distinctly exercised; and it is by the coolness and deliberation of these processes, that the impetuosity of a motive is often held in check, and sometimes finally extinguished. Once ascertained to exist, however, they become powerful auxiliaries to motives. By holding out the prospect of actual gratification, they wonderfully increase their seductiveness and force; and hence they may, with propriety, be enumerated in the general mass of inducing considerations, which determine the mind in its subsequent steps of willing and resolving which are the elements of purpose.

Sometimes, pains are taken to ascertain the existence and nature of means, by actual previous inquiry or examination. Sometimes, the conclusion as to means is made up from previous knowledge, or from a general estimate of probabilities. And sometimes, the purpose is matured without any reference to means, other than as possible contingencies, to be taken advantage of, as they may occur.

The subject of means is closely connected with those of *preparations, opportunities* and *facilities* for the commission of crime, as will appear under those respective heads.

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(a) 8 Jud. Evid. 189.

## SECTION VI.

*Verbal intimations of future criminal action.*

Motives, with the *means* that serve to shape and stimulate them, as they have just been considered, constitute the essential sources of criminal action; and may be regarded as the first link in the chain of precedent circumstances which connect a crime with its perpetrator. They form the basis upon which mental action, as regulated by will, assumes that precise and determinate character which is best described by the word "purpose." (a)

In the natural course of crime, a purpose contemplated in the light of the means supposed to be adapted to its accomplishment, soon becomes, if persisted in, matured and developed into a definite plan of conduct, embracing all the particulars requisite to the attainment of the ultimate end in view; and it is in this sense of plan or systematic contrivance, that the word "design" seems to have its most appropriate application. (b) Up to this point, the criminal action is exclusively mental or internal. But, in order to carry the purpose and plan into effect, external or corporal action next becomes necessary. The means supposed to be available are to be actually sought after, brought within reach, examined to test their efficacy, arranged in suitable combinations, and finally used as immediate physical or mechanical instruments of the intended offence. In other words, the requisite *preparations* are to be made; and these preparations, taken in the broadest import of the term, may be considered as constituting the next general division of those circumstances which are *precedent* to the commission of crime.

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(a) See *ante*, p. 284.

(b) See *ibid.*



These proceedings may be, and sometimes are, conducted throughout with all that *secrecy* which has been elsewhere remarked as almost a peculiar characteristic of crime. The most skilfully contrived and deeply laid plans of evil are usually of this description. The motive, purpose and plan, are studiously kept within the mind where they originated; the preparations are carried on under an impenetrable veil; and no intimation of the intended act is given until the blow is finally struck. But it sometimes happens that *indications*, more or less distinct, of the act in contemplation, (carefully presented, however, in the general character of *an event*,) are suffered to escape to the world without, and thus become the subjects of precedent circumstantial evidence. These it is now proposed to consider.

The indications just mentioned, it may be observed, are almost exclusively confined to the higher degrees of crime, such as murder and arson; and they consist of *verbal expressions* referring, with more or less directness, to the individual whose injury is contemplated, and the event that is to befall him. In these expressions, slight as they may appear, the criminal takes a very material step forward in his career;—material, both as to its consummation by himself, and its future detection and punishment by the law. Speech may be said, in this respect, to occupy the middle ground between thought and action, connecting both; giving outward shape to the former, and throwing important light upon the latter. The maxim, *Index animi sermo*, (a) here literally applies. So long as the criminal confines himself to thought, and conceals his motive, purpose and plan within his own breast, he leaves nothing for evidence, in any direct form, to attach itself upon. His motives, as has been shown, can be reached only indirectly, through the medium of inferences, and by a process of probable reasoning. But when he ventures to speak, he steps out at once from the

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(a) Broom's Maxims, 268.

obscurity in which he had been concealed, and whatever disguises he may employ, presents himself directly and effectually, as a subject of notice and of evidence.

The verbal expressions under consideration are found to assume different shapes, according as they are the offspring of cold-blooded craft, or more violent and hasty malignity. In the former case, they are sometimes managed with great art; they are thrown out voluntarily and purposely, it is true, but in so obscure and intangible a form, as to amount to nothing more than mere general intimations. They are, in fact, parts of a system of *preparation*, but of the most preliminary kind; intended to explore the way for more direct action in future. The criminal ventures no farther than to hint at or obscurely allude to the act he has in contemplation. He proceeds warily, throwing out feelers, as it were, in advance, partly to sound the temper of those among whom he trusts himself; and partly, to give an air of probability to the approaching event, and yet to disconnect himself from all apparent agency in producing it. Thus, a man, meditating the murder of his wife, was heard to say,—“my wife is a queer body; I should not be at all surprised if she were to take herself off, some fine morning.” (a) Here, even the event itself is not directly mentioned; departure or disappearance is all that is spoken of; and even that attributed to a cause which, to a stranger, might appear abundantly sufficient to account for it,—oddness or peculiarity of habits or character. In other cases, the intimations are given out in the form of *reports*, bearing indirectly upon the object in view, and intended to prepare the minds of friends and neighbors for the event. Thus, in a case where the death of a young man of fortune was resolved on, reports were put in circulation, that his health was rendered desperate by his own imprudence, which was daily accumu-

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(a) Best on Pres. § 233.

lating causes upon causes to accelerate his end. (a) Here the fact of death was distinctly, although indirectly, intimated; and to give it greater probability, it was attributed to a cause which, if true, would be recognized by most persons as, in the natural course of things, a sufficient one. In other cases, again, the approaching fate of the intended victim is mentioned in express terms, but placed on a ground professedly intended to repel the idea of any human agency,—to wit, supernatural indications. In one case, where murder by poisoning was contemplated, it was declared that omens of a peculiar kind had been observed; music had been heard in the house, which, it was said, presaged the party's death within a twelve-month. (b) In another case, where three murders were in contemplation, the criminal told the mother of one of the victims, that she had had her fortune read; and that, within six weeks, three funerals would go from her door, namely, that of her husband, her son, and the child of the person whom she was then addressing. (c)

Care is generally taken, in uttering these intimations, to adapt them to the ideas and intelligence of those to whom they are addressed, or upon whom they are intended to make an impression. Thus, omens, auguries and predictions are relied on, among those whose habits and limited intelligence induce them to place confidence in such sources of knowledge. But, notwithstanding the art which may be employed, they frequently fail of their intended effect, from the mere want of the “art to conceal” it. Their essential clumsiness

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(a) *Rex v. Donellan*, Gurney's Report, 1781; cited in Best on Pres. § 234. 3 Benth. Jud. Evid. 66.

(b) *Rex v. Blandy*, 18 State Trials, 1117, 1143, 1153.

(c) Case of *Susannah Holroyd*, Lancaster Assizes, 1816; Best on Pres. § 234. In the German case of *Gesche Margarethe Gottfried*, where a woman had poisoned her whole family, she had previously gone to a fortune-teller, who predicted that her whole family would die before her. 4 Lond. Legal Observer, 89, 90.

is sometimes manifest, (as in the last instance above given ; ) and the result of their utterance is the very reverse of that intended ; namely, to fix attention upon the party uttering them, and thus to establish between him and the event alluded to, the very connection he seeks to avoid. Hence, when the event comes to happen, the expression anticipating it is at once remembered. There is what the civilians would call *damnum prædictum et malum secutum*,—a very pregnant and reasonable ground of suspicion. On this account, expressions of this kind often become important, as elements of circumstantial evidence, constituting a material link in the chain of precedent circumstances, tending to fix a crime charged, upon the party accused of its commission.

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## SECTION VII.

### *Expressions of Ill-will.*

In the verbal indications of intended crime, mentioned in the last section, care is usually taken to suppress all signs of interest or feeling that might reveal the malignant disposition really entertained. This is done, with the double motive of avoiding any risk of danger to the criminal himself, and the additional risk of alarming his intended victim. And so far is this attention to outward demeanour sometimes carried, that not only is every kind of intimation suppressed, and resentment itself wholly dissembled, but positive regard and even affection is counterfeited, as a means of striking a surer blow. (a)

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(a) In the case of *Rex v. Goodere*, the prisoner, having determined to murder his own brother, with whom he had been on unfriendly terms, and

In many cases, however, where the feeling of hatred is strong, and the revengeful impulse ardent and active, all considerations of prudence are overborne and cast aside. The expressions which escape the lips partake of the state of mind and heart from which they proceed, and no pains are taken to conceal or qualify them. In these, therefore, the criminal takes another, and (so far as evidence is concerned) a still more important step onwards in his career. His *motive*, which before could only be conjectured, or, at best, inferred by a process of reasoning, stands now directly revealed. His heart is, as it were, laid open to view, showing enmity or desire of revenge to be the source and spring of his whole conduct.

These expressions of ill-will assume a variety of forms, according to the character and strength of the feeling which prompts them. Sometimes, they are uttered in terms of intense though respectful complaint; attempts being, at the same time, made to arouse resentment on the part of the persons addressed, against the subject of them. (a) At other times, they are expressed in the undisguised form of opprobrious epithets, charging some injurious act. (b) Some-

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desiring to get possession of his person, contrived, under the pretext of wishing a reconciliation, to obtain an interview with him, at a friend's house. On meeting his brother, upon this occasion, he carried his pretence of affection so far as to kiss him heartily, and afterwards drank his health. 17 State Trials, 1020. In the case of *The People v. Kesler*, the prisoner, after having deserted his wife for upwards of five years, returned to her with offers of reconciliation, and by that means obtained the opportunity of administering to her the poison which caused her death. 3 Wheeler's Crim. Cases, 18, 65. In the recent case of *The People v. Williams*, (New York Oyer & Terminer, May, 1854,) the circumstances were very similar.

(a) See the trial of *James Stewart*, 19 Howell's State Trials, 1, 125. Trial of *John Barbot*, 18 *Id.* 1229, 1250.

(b) See *Henry Harrison's* case, 12 *Id.* 841—848. In the case of *The People v. How*, the prisoner had called the deceased "a cursed villain, and the greatest enemy he had." 2 Wheeler's Crim. Cases, 415. In the late English case of *Regina v. Rush*, the prisoner had not only called the deceased (who was Recorder of Norwich,) "a fellow," and "a villain," and saying

times, the hatred felt is actually expressed in terms, extending occasionally to others in the same connection. (*a*) In other cases, the death of the party is directly or indirectly desired; (*b*) in others, a willingness is expressed to take a part in his death; (*c*) and in others, again, a strong desire to inflict, at whatever cost, some dangerous injury. (*d*) In many of those cases in which the death of a person is distinctly desired, it is placed on the footing of an act of retribution, (*e*) the criminal striving to hide the enormity of his intended offence under a color of justice. In one pre-eminently atrocious case of parricide, the malignant passion burst all bounds, and disclosed itself in a torrent of imprecations and curses almost too violent for belief. (*f*)

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that he had no right to the property in his possession, but actually repeated the expressions in writing, and used them in a printed pamphlet. *Burke's Trials*, (Upper Classes,) 463, 464, 515. In the late case of *The State v. Carawan*, the prisoner had called the deceased a scoundrel, and charged him with seducing his wife. Pamphlet Report, 46, 47, 48.

(*a*) In *Philip Standfield's* case, the prisoner had said, "he had hated his father these six or seven years." 11 *State Trials*, 1897. In *James Stewart's* case, one of the accused parties had said "he hated all the name of Campbell." 19 *Id.* 100.

(*b*) In the case of *Katharine Nairn* and *P. Ogilvie*, the wife had said of her husband, that "she lived a most unhappy life with him, and that she wished him dead; or, if that could not be, she wished herself dead." 19 *State Trials*, 1290. In the American case of *Bathsheba Spooner* and others, it was proved that Mrs. *Spooner* had said "she wished Mr. *Spooner* was out of the way; she could not live with him;" that "she wished 'old Bogus' was in heaven," &c. 2 *Chandler's Am. Crim. Trials*, 20, 25. And see the case of Mrs. *Chapman*; *Commonwealth v. Chapman*, *Celebrated Trials*, (Phil. 1835,) 882.

(*c*) See the trial of *James Stewart*, 19 *State Trials*, 122.

(*d*) In the same case, the prisoner had been heard to say that "he would be willing to spend a shot upon *Glenure*, [the deceased,] though he went upon his knees to his window, to fire it." 19 *State Trials*, 147.

(*e*) "He *deserves* to have his throat cut." *Harrison's* case, 12 *State Trials*, 841, 842. "He *deserves* shooting, and shooting would be too good for him." *The State v. Carawan*, Pamphlet Report, 48. Sometimes, as an act of necessity. *The People v. How*, 2 *Wheeler's Crim. Cases*, 414. "A man might *make* me kill him." *The State v. Carawan*, Pamphlet Report, 46.

(*f*) Trial of *Philip Standfield*, 11 *State Trials*; 1896, 1897. In another

## SECTION VIII.

*Declarations of criminal intention.*

The next form in which language becomes an index of intended criminal action, is in the more positive one of *declarations of intention*. As expressions of ill-will tend to betray motive, so declarations of intention serve expressly to reveal purpose. (a) They are thus one stage farther advanced towards the act in view ; and, in this respect, present still more important materials for evidence of the circumstantial kind.

It is seldom, however, that persons are found to indulge their malignant impulses so far as thus voluntarily to divulge their criminal purposes ; putting, by this means, their intended victims on their guard, while they compromise, in a greater or less degree, their own safety. In some crimes, it may be said never to take place, being utterly inconsistent with that secrecy which is essential to success. The burglar, robber, forger and thief, never thus advertise their intended proceedings in advance. But in cases of contemplated murder, the feeling of animosity sometimes becomes so intense, and the mind so restless and impatient of delay, that the avowal of purpose escapes the lips, sometimes, in unguarded moments, and, more rarely, from express design.

In some cases, the declaration is made in a conditional form. (b) In others, it is made absolutely, but in a form

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case of parricide, the grossest epithets of abuse had been applied to the deceased. Trial of *Mary Blandy*, 18 *Id.* 1148, 1151, 1154. And see the late American case of *Adeline Phelps*, Law Reporter, May 1854.

(a) As to the distinction between these terms, see *ante*, p. 288.

(b) "If he don't do as he has agreed, I will kill him." *The People v. How*, 2 Wheeler's Crim. Cases, 412.

expressive of a purpose not fully matured. (a) In others, again, it is expressed generally, designating no particular person by name. (b) More rarely, it is made in the most explicit and decided terms. In a case where a woman was tried for murdering her husband by poison, it was proved that she had previously expressed her dissatisfaction with him, and said, "if she had a dose she would give it to him;" and that she had further said "she was resolved to poison her husband," and told the witness how she intended to procure the poison. (c)

It is possible, and, doubtless, sometimes the fact, that very distinct expressions of intended action may be used, and made no secret of, and yet no definite purpose of crime have actually been formed. Malignity of heart may outstrip the mature action of the will, in which purpose originates. In the intensity of his desire to injure, the criminal may say that he *means* to do the act which, nevertheless, he has not fully resolved on. There is often a satisfaction in hurling forth these verbal missiles of animosity, with all the force and point that language can impart to them. In this view, declarations of intention may amount to nothing more than intenser forms of the expressions noticed in the last section, deriving their precision, possibly, from some passing idea presented to the mind at the moment of utterance.

But, in the majority of cases, it is probable that these declarations do truly indicate an injurious and evil purpose, either actually formed, or on the point of being formed in the mind from which they proceed. Their tendency, if not their effect, always is to show settled ill-will, which the person uttering them is prepared, on a fitting occasion, and with proper means, to carry into act. And it is in this that their peculiar value, as elements of circumstantial evidence, resides.

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(a) "I have a great notion to kill him." *The State v. Arrison*, Cincinnati Crim. Court, December, 1854.

(b) *Rex v. Barbot*, 18 State Trials, 1251.

(c) Trial of *K. Nairn* and *P. Ogilvie*, 19 *Id.* 1272, 1273.



## SECTION IX.

*Threats to injure or destroy.*

Closely allied to declarations of intention, are positive *threats* to do the injury intended. These are, in fact, a more violent and determined species of declaration, dictated by a still higher degree of passion, and usually uttered in moments of uncontrolled excitement. In their language, as the exponent of criminal action, desire and purpose assume their strongest forms.

A similar variety is observable in threats, as in the declarations last noticed. Sometimes, they are expressed with studied vagueness, alluding obscurely to some undefined evil in store for the object of them. (a) A very common form of threat, where a person has conceived himself aggrieved, is that he “will be *even with*” the other, at some future day. Sometimes it is, more explicitly, that he “will have his revenge;” (b) or, more savagely, that he “will have the blood” of the other. (c) Sometimes,—that he “will certainly be the death of him.” (d) Occasionally, it is uttered in an indirect form, the malicious purpose being implied rather than expressed; as where the threatener says he “wants nothing more than to meet the other at a convenient place.” (e) In some cases, the particular mode of injury or destruction is specified, either in ordinary or conventional language; (f) and threats of this kind are

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(a) “He will never die in his bed.” *Harrison's case*, 12 State Trials, 848.

(b) *The People v. How*, 2 Wheeler's Crim. Cases, 415.

(c) *Harrison's case*, 12 State Trials, 841, 846.

(d) Major *Strangways'* case, Burke's Cel. Trials connected with the Upper Classes, 22.

(e) Trial of *James Stewart*, 19 State Trials, 101. “Let me alone, I'll manage him.” *Harrison's case*, 12 State Trials, 842.

(f) In *Philip Standfield's* case, the prisoner threatened to cut his father's throat. 11 State Trials, 1899. In *James Stewart's* case, one of the threats

often of peculiar importance, as indicating the means most likely to be employed in carrying them into effect. A threat to shoot, for instance, is often made good literally. (*a*)

Threats are sometimes distinguished from mere declarations of intention, (with which, in other respects, they are identified,) in this respect,—that they are designed to make an unpleasant or painful impression upon the person against whom they are directed; (*b*) and, with this view, they are intended to come to his notice; the latter object being directly attained, by addressing them to the person himself, and indirectly, by uttering them before others, who, it is supposed, will communicate them to him. (*c*) They are, indeed, often intended to create apprehension of the act threatened, and to give pain by the alarm and terror which they may produce, and sometimes this may be all that is intended. (*d*) But the malignity that can deliberately threaten the greatest of all evils to another, is not usually content with the gratification that mere words can afford, even where they have actually produced the effect desired. It is true that the tendency of such declarations, (and, indeed, of all declarations of intention carelessly uttered,) is to obstruct and frustrate their own accomplishment. “By threatening a man,” observes Mr. *Bentham*, “you put him upon his guard, and force him to have recourse to such means of protection, as the force of the law, or any extra-judicial powers which he may have at command, may be capable of

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uttered was, to “make *black cocks* of those who would turn out the tenants,” this expression being considered, in the Scotch Highlands, equivalent to *shooting*.

(*a*) See *The People v. How*, 2 Wheeler’s Crim. Cases, 414. *The State v. Carawan*, Pamphlet Report, 48. In the case of *Bathsheba Spooner* and others, one of the murderers had threatened to put the deceased “in the well” for two coppers. And he was actually killed by being thrown into the well after having been knocked down. 2 Chandler’s Crim. Trials, 8, 14, 19.

(*b*) 8 Benth. Jud. Evid. 70, 77.

(*c*) *Id.* 71.

(*d*) *Id.* 78.

affording to him." (a) But then, it is equally true, that threats are often disregarded and despised; it is only the more timid dispositions that are influenced by them; and, in most minds, there is an unwillingness, even if fear be felt, to manifest it by any outward acts or precautionary proceedings. To this contempt of the mere language of an enemy, and the exposure of person which has followed, have many courageous persons notoriously owed their deaths. And it may be that the threatener, in these cases, has counted, in advance, upon this very circumstance. Besides, it is admitted by the author above quoted, that, "by the testimony of experience, criminal threats are but too often, sooner or later, realized. To the intention of producing the terror, and nothing but the terror, succeeds, under favor of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief; and (in pursuance of that intention,) the mischievous act." (b) Indeed, the mere fact that the threatener's expressions have been defied, (his attempts to produce pain being thus openly proved impotent,) may serve to give new edge to a malignant temper, to settle at once a previously vacillating purpose, and to produce a firm determination that the victim (now doubly hated as an open foe,) shall feel in act, what, in words, he despised.

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(a) 8 Jud. Evid. 78.

(b) *Id.* 78, 79.

## SECTION X.

*Preparations for crime ; including the acquisition of means.*

Next, in order, to *verbal* indications of intended crime, and constituting the next link in the chain of precedent circumstances, already mentioned as serving to connect a crime with its author, are the actual *preparations* for its commission.

In a general sense, some of the verbal expressions, noticed in the preceding sections, may be regarded in the light of preparations bearing on the particular act in contemplation. (a) But the preparations now to be considered, and which are properly so designated, consist of corporal acts and mechanical processes, constituting subjects of evidence altogether distinct from the preceding.

This class of precedent circumstances exhibits a new advance, and a still more material one than any yet noticed, towards the consummation of a criminal design. The party no longer merely feels, meditates, resolves, utters his feeling or purpose in words, as has been described,—but proceeds to *act*. His attitude now is that of one who has definitely conceived his object, arranged his plan, and fully determined on its accomplishment. The coolness and deliberation which always accompany and characterize acts of preparation for crime, indicate the depth at which the malignant disposition has taken hold of the moral nature, converting the mental and even the physical powers into mere instruments of its exercise. A bad *motive* may be only transiently

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(a) Mr. *Bentham* classes preparations, declarations of intention, and threats, under one head. 3 Benth. Jud. Evid. 62, book 5, chap. 4. “Declarations of intention,” he observes, “are expressions of intention purposely conveyed by words ; by preparations, purposely or not, the intention is expressed by acts.” *Id.* 70.

cherished, and even a palpably malignant *expression* may plead exasperation of temper in its excuse ; but the man who coolly sits down to plan the death or injury of another, and to arrange, with the art sometimes required, the details of its accomplishment, acts always from a determined will, instigated by a radically wicked heart.

Hence, actual preparations for crime always afford one of the most important classes of precedent circumstances capable of being judicially presented in evidence. Their value is especially great in cases of homicide, where they constantly serve to determine, beyond doubt, the questions which are so often raised at trials, and by which juries are so materially perplexed, as to the existence of previous malicious *design*, on the part of the accused. Their value consists, also, in another important particular, namely, the superior facility and accuracy with which they are capable of being reported in evidence. *Motives*, as we have seen, not being objects of sense, can be reached only indirectly, through the medium of other circumstances ; words and *expressions* may be indistinctly heard, or, if heard, quite misunderstood ; but *acts* of preparation address themselves to the most observant and accurate of the senses,—they speak to the eye as well as the ear, and leave more faithful impressions upon those who witness them, with less consequent liability to error in the testimony given.

An important element among circumstances indicative of crime, consists of the *means* necessary for, or adapted to its effectual perpetration. These means, as has been already observed, (*a*) are sometimes contemplated by criminals at an earlier stage, even before the formation of a distinct purpose. But it is when the time for action arrives, that they become the objects of especial attention ; and hence the processes of seeking out, collecting, examining, adapting and arranging them, with a specific object, always form a

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(*a*) *Ante*, Section V.

most important constituent in criminal preparations. Among these means, or instruments, (as they may otherwise be termed,) are physical objects and substances, and mechanical aids and devices of various kinds, known to be adapted or purposely contrived for attaining the end in view; such objects and instruments belonging to that peculiar class of circumstances which have already been considered under the head of *physical facts*. (*a*).

Preparations for crime cover a very extensive field. Beginning at a point considerably in advance, they are often brought down to the very moment previous to the intended act; (*b*) and sometimes, in effect, go beyond it; referring to acts to be done afterwards. (*c*) They are usually divided into two principal kinds; first, those which are directed towards the immediate accomplishment of the criminal design; and, secondly, those of an auxiliary character, intended to prevent discovery or suspicion of the preceding. (*d*)

### *I. Direct or principal preparations.*

Among the direct preparations for the commission of crime, may be enumerated the following.

1. The contriving and fashioning, or the procurement of the fashioning of instruments or means of mischief or de-

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(*a*) See *ante*, Section II.

(*b*) See instances of preparations at both these stages, in the case of *Rex v. Patch*; Wills, Circ. Evid. 280.

(*c*) In the case of *Rex v. Thurtell* and *Hunt*, the murder was so deliberately planned, that the principal criminal, before setting out to commit it, provided himself with a sack and cord to receive and hold the body of the man he had determined to kill. *Celebrated Trials*, 5. (Phil. 1835.) In the case of *John Adam*, preparations were made, before the crime was committed, for leaving the country afterwards, by drawing money from a bank, &c. 11 *London Legal Observer*, 415—417.

(*d*) These divisions have sometimes been carried farther. See 8 *Benth. Jud. Evid.* 64. *Best on Pres.* § 288.

struction, or the obtaining them by purchase, borrowing and even theft: such as explosive machines, fire-arms, knives, hatchets, and poisonous substances, for taking life; combustible substances and inflammable materials for burning; picklock keys and other tools for entering buildings; coining instruments for counterfeiting; and dark lanterns, ladders, disguises, &c., to facilitate the use of such means.

In some instances, much time is spent, and much ingenuity exercised in contriving and fashioning these instruments of crime. In a celebrated case of arson, committed in the Royal Dock-yard at Portsmouth, in 1777, the incendiary commenced his preparations by procuring a wooden box to be made for holding combustibles, and a tin case or canister, to be attached to the box, for receiving and concealing a candle. He next busied himself for some time, in making a composition for a slow match, by grinding charcoal very fine, mixing it with gunpowder, and spreading the mixture, in a moist state, upon paper. (a) In a late atrocious case of murder in Ohio, the instrument of death was very elaborately contrived. First, an explosive engine or machine was obtained, made apparently of a piece of iron gas-pipe or tube, with the ends closed, and containing powder and slugs. Next, as a means of concealing this, and transmitting it to its destination, a wooden box was procured to be made, according to a certain pattern, with the lid so contrived that the effort used in opening it, would set in motion the machinery for discharging the tube. After the box was made, it appears to have been too small to receive the machine, as it was taken back to be enlarged, by cutting out parts of the ends and lid. (b)

An invariable characteristic of these preparations for crime is *secrecy*, or withdrawal from human observation, either

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(a) Trial of *James Hill*, alias, John the Painter, 20 Howell's State Trials, 1817.

(b) *The State v. Arrison*, Cincinnati Crim. Court, December, 1854.

absolutely and entirely, or to such an extent as is considered equivalent. Where the criminal creates or prepares the instrument exclusively with his own hands, the means of ensuring secrecy are always in his power. Being under no necessity of communicating with others, he shuts himself up to his work in some private apartment. He may thus prepare a poisonous liquid by distillation, unobserved. (*a*) Where he is compelled to call in the aid of others, as in mechanical contrivances like those just mentioned, he endeavors to disarm any suspicion that may arise from the singular character of the work ordered to be done, by declaring it to be intended for some very particular, but harmless purpose; (*b*) or sometimes takes the bolder course of treating all expressions of suspicion as idle, and refusing to give any explanation whatever. (*c*) And his conduct, in either case, often furnishes important evidence towards his detection.

Where an instrument of death is obtained by borrowing from another, it is often under similar pretexts of harmless uses. In the case of Major *Strangways*, the prisoner obtained a carbine from a friend who borrowed it for him, and had it loaded, alleging that he wanted it to kill a deer. (*d*) And even where it is procured by purchase, similar excuses are often made, (*e*) especially where the article is a poison, and familiarly known as such. Thus, where arsenic, in particu-

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(*a*) See the case of *Rex v. Donellan*, Gurney's Report, 1781.

(*b*) In one case, the prisoner had taken a small-sword to a cutler, and directed it to be ground as sharp as a carving-knife; saying that he wanted it "for the use of a carving-knife." *Rex v. Corder*, Celebrated Trials, 221. (Phil. 1835.)

(*c*) *The State v. Arrison*, Cincinnati Crim. Court, December, 1854.

(*d*) 5 London Legal Observer, 91.

(*e*) Other devices are sometimes resorted to, for the purpose of concealment. In the case of *The People v. Peverelly*, where a quantity of turpentine and camphene was purchased, as a means of arson, the bill for the articles was ordered to be made out in a false name. New-York General Sessions, November, 1854.



lar, is procured, it is almost invariably under the pretext of being used to kill rats and other noxious animals. (a) A strong instance of the secrecy observed in procuring and transmitting this particular agent of destruction, occurred in a celebrated Scotch case, where a woman and her paramour were convicted of murdering her husband by poison, which was obtained by the male prisoner and sent to the other. In the first place, an appointment was made with a surgeon, who dealt in drugs, to visit the prisoner at a vintner's; and when there, the surgeon was taken aside privately, and asked if he had laudanum and arsenic, (the latter being represented to be wanted to destroy some dogs.) The surgeon, finding he had both, put up a small quantity of each and took them to the prisoner, the next day, at the same place. There, the same privacy was observed again, the prisoner receiving the articles in a private room. In the next place, the articles were delivered to a trusty person, found to be going directly to the other prisoner, with an injunction to deliver them to no one but her, and to give them into her own hand; and the double precaution was observed, of sealing the packet with both wax and wafer. Lastly, the messenger, on his arrival at the house, was taken

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(a) See the case of *Nairn and Ogilvie*, cited *infra*. Case of *Gesche Margarethe Gottfried*, 4 Lond. Legal Observer, 89. *Rex v. Burdock*, Best on Pres. § 196. *The People v. Green*, Rensselaer Oyer & Terminer, July, 1845. Pamphlet Report, p. 28. In the case of *Commonwealth v. Mina*, the prisoner first inquired at a drug store, for arsenical soap, for the preparation of birds. On being told that they had none, but might prepare it, he replied that was useless, but if they *had the powder*, that would answer; and he then purchased a quantity of the latter. Celebrated Trials, 888; (Phil. 1835.) The pretext here was utterly false, but the art employed was apparent; the prisoner avoiding the inquiry for arsenic, in the first instance. A very similar kind of art was employed in the case of *The People v. Green*. While conversing in a store, with the proprietors, the prisoner contrived to turn the conversation to the subject of arsenic, as a means of destroying vermin, by pretending to see a rat or mouse on a shelf. The question was then casually and carelessly asked, how much it would take to kill a person. Pamphlet Report, p. 24. The poison was ultimately obtained in a clandestine way.

by the female prisoner to a room up stairs, where he delivered to her the articles, which she immediately placed in a drawer. (a)

Sometimes, where poison is thus sent from one person to another, it is disguised under a false name. In the case of *Mary Blandy*, where arsenic was employed, it was put into a paper, and labelled, "Powder to clean Scotch pebbles." (b)

There are other cases, again, where the criminal dares not trust himself even to the exposure involved in purchasing or borrowing the article determined on, but gets possession of it by surreptitious means. Fire-arms and poison are often procured in this way. (c)

The secrecy just alluded to, is not only observed in procuring the means of mischief, but in *keeping* them concealed until the preparations are fully matured, or until an opportunity occurs for their use; and this is particularly the case where the means are themselves not of an ordinary kind. But, with all the precautions taken, it sometimes happens that they become the subjects of notice by others, either accidentally, or upon search. The effect of such discovered

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(a) Trial of *K. Nairn* and *P. Ogilvie*, 19 State Trials, 1292, 1289. In *Gesche M. Gottfried's* case, the prisoner obtained poison by the following artful contrivance. She knew that her mother had some arsenic, which she kept for poisoning mice. She accordingly went to her, and saying that she was troubled with mice in her house, asked if she knew of any means of destroying them, pretending that she knew nothing of poison. Her mother put some arsenic on bread, and placed it in the room said to be infested with the mice, warning her daughter at the same time, to keep the apartment locked, for fear of mischief to the children. A day or two after this, *Gesche* went into the room, and took away the poison, which she *scratched from the bread*, as if the mice had taken it. She afterwards told her mother that the mice had taken it, and asked her for more, which was given her; and in this way she possessed herself of a sufficient quantity for the purpose she had in view. 4 Loud. Legal Observer, 90.

(b) 18 State Trials, 1136, 1149, 1157.

(c) See *Barbot's* case, 18 State Trials, 1261, 1262. *The People v. How*, 2 Wheeler's Crim. Cases, 419. *The People v. Green*, *ubi supra*.

possession will be more particularly considered under a subsequent head. (*a*)

2. Another class of direct preparations for crime includes those of a more advanced character ; such as actual *trials* of the selected means, to test their sufficiency, or the skill of the party in using them. Practising with pistols, at a mark, is a familiar instance. (*b*) To the same head may be referred the procurement of disguises for the person, consultation with confederates, as to the time and manner of making the intended attempt, (*c*) making the party's will (*d*) and the like.

3. Last among the direct preparations for crime, are those which are immediately precedent to the act, extending nearly or quite to the time of its commission. Lurking around the scene of crime, taking notice of localities and objects, (*e*) adopting precautions to prevent the discovery of approach ; and keeping the criminal purpose steady by the use of artificial stimulants, (*f*) may be classed under this head. An instance of extremely elaborate preparations for arson, reaching almost to the moment of applying the fire, was afforded in a late case in New York. The parties were arrested about midnight, in their own store ; and the appearances presented by the interior of the building showed that they had bestowed much time and industry in applying and arranging the materials of destruction, and were just on the eve of putting them into active operation. On entering the store, the floors, in several of the stories,

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(*a*) See *post*, Section XI.

(*b*) See *Barbot's case*, 18 State Trials, 1261. *Commonwealth v. Fuller*, 2 Wheeler's Crim. Cases, 228.

(*c*) Mrs. *Arden's case*, 5 Lond. Legal Observer, 59. Mrs. *Spooner's case*, 2 Chandler's Am. Crim. Trials, 38—41.

(*d*) *Barbot's case*, 18 State Trials, 1258, 1266.

(*e*) *Rex v. Smith, Varnham and Timms* ; Wills, Circ. Evid. 289.

(*f*) See Mrs. *Spooner's case*, 2 Chandler's Am. Crim. Trials, 41. *Regina v. Rush*, Burke's Trials, connected with the Upper Classes, 494.

were found strewed or heaped with loose cotton taken from bales in the building; the crevices of the door and windows were carefully stuffed with it; and a number of bales were brought together into situations most likely to expose them to the action of the fire, and to communicate the flames with the greatest rapidity through the whole building. Inflammable liquids, proved to be spirits of turpentine and camphene, were found to have been poured over and among the cotton, in various places, and in some so profusely as to saturate it. Other combustibles were also made use of, and pieces of candle were provided and arranged for the immediate application of the fire. (a)

## II. Auxiliary preparations.

Among auxiliary preparations for crime, the following may be mentioned.

1. The removal of obstacles out of the way; such as persons who might prevent the act, or, at least, render it hazardous by witnessing its perpetration. In Earl *Ferrers'* case, a female living with the prisoner was sent out to walk with the children, and directed to be absent for two hours and upwards. (b) In Mrs. *Arden's* case, the servants were sent away to town, during the time the murder was committed. (c) In *Moses Drayne's* case, a similar precaution was observed. (d)

( 2. Acts intended to avert suspicion of an evil purpose. Preparations of this description are sometimes made considerably in advance of the intended crime. An elaborate instance of this occurred in the case of *Richard Patch*, who

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(a) *The People v. Peverelly*, New-York General Sessions, November, 1854.

(b) 19 State Trials, 904.

(c) 5 London Leg. Observer, 59.

(d) *Id.* 128.

was executed in 1806, for the murder of his employer. (a)

X "The prisoner and the deceased lived in the same house, and the latter was, one evening, shot, while sitting in his parlour, by a pistol from an unseen hand. A strong and well connected chain of circumstantial evidence fixed *Patch* as the murderer; in the course of which, it appeared that, a few evenings before that on which the murder was committed and while the deceased was away from home, a loaded gun or pistol had been discharged into the same room. (b) This shot the prisoner represented, at the time, as fired at him; but there were strong grounds for believing that it must have been done by himself, in order to avert suspicion, and induce the deceased and his servants to suppose that assassins were prowling about the building." (c)

The peculiar art of this proceeding consisted in the circumstance that the shot was fired *in the absence* of the deceased; such absence being, of course, known to the prisoner; which, (so far as exterior appearances and first impressions would go,) tended, at once, to negative any supposition that it could have come from his hand.

X (An equally artful species of preparation, referable to this head, consists of proceedings intended actually to *create*, in advance, *evidence* of an *exculpatory* character. A remarkable instance of this occurred in the case of Major *Strangways*, who was tried for the murder of his brother-in-law, in 1657. In this case, the prisoner confessed that the night the murder was committed, he left a person at his lodgings, to personate him, whom he took care to introduce about seven in the evening, while the people of the house were employed in their necessary affairs, and not at leisure to take any notice of his actions. This friend, he said,

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(a) Wills, *Circ. Evid.* 280.

(b) According to the statement of Mr. *Wills*, it was fired into a different room. *Circ. Ev.* 281, 282.

(c) Best on Pres. § 284.

walked about the chamber, so as to be heard of all the family, which occasioned them to give a *wrong deposition*, concerning his being at home, when he was examined before the magistrate. He added that after the act was committed, he returned to his lodging, found means to discharge his friend, then hastened to bed, and lay there till he was apprehended at three in the morning. (a)

This was a singular instance of a deliberate contrivance or attempt to create *alibi* evidence, in advance of a crime, through the medium of wrong impressions intentionally produced upon unsuspecting persons. But evidence of this kind has sometimes been provided by more direct and seemingly more effectual means. In the American case of *John Hauer* and others, where several persons were concerned in a most atrocious murder, it appears to have been a part of the plot for each of the prisoners to sleep, on the night of the murder, with some one who could testify to an *alibi*. *Hauer* had requested a man to sleep in his house, and in the room with him, during that night. Another of the parties went several miles from the place of the murder to sleep, and two others went to a tavern, some miles distant, and went to bed together. (b)

The common expedient of disguising criminal preparations, by mixing them up with acts and substances of a notoriously harmless character, is also referable to the present head. A person, having procured a still, with the view of preparing a poisonous vegetable extract, disarms suspicion by first employing himself frequently and openly, in distilling roses. (c) Another who has procured arsenic, provides himself, at the same time, with other substances,

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(a) *Burke's Trials* connected with the Upper Classes, 20, 24.

(b) 2 *Chandler's Am. Crim. Trials*, 353, 366.

(c) *Rex v. Donellan*, *Gurney's Report*, 1781; *Celebrated Trials*, 147. (Phil. 1885.)

resembling it in appearance ; such as soda, cream of tartar, and the like. (a) Indeed, so far is this desire of averting suspicion carried, that criminals have been known to expose themselves, in a partial degree, to the operation of the destructive agent which they had prepared ; or, where this was not hazarded, to say and pretend they had done so. (b)

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## SECTION XI.

### *Opportunities and facilities for the commission of crime, including the possession of means.*

The next link in the chain of precedent circumstances serving to connect a crime with its perpetrator, is that of *opportunity* for its commission. It is this circumstance, and this only, which brings the criminal into that actual contact with the person or property aimed at, which is necessary to the perpetration of every crime ; and it thus forms a positively essential element of guilty agency, in every case. Want of opportunity is want of power. Hence, it is always a conclusive answer to a criminal charge, no matter how strongly it may be supported by other evidence, that the accused had, in fact, no opportunity to commit it : and in this consists the force of *alibi* evidence. Where, on the other hand, it is shown, in addition to other circumstances, that the accused had an opportunity to do the act, it becomes a positively criminative circumstance against him, of greater power in proportion to the completeness or frequency of the opportunity proved.

Opportunity has been more precisely considered as a sort

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(a) *The People v. Green*, Rensselaer Oyer & Terminer, July, 1845; Pamphlet Report, 11, 14, 20, 87.

(b) *Rex v. Blandy*, 18 State Trials, 1145.

of modification of *means*. "By opportunity," observes an acute writer on this branch of evidence, "seems to be understood an assemblage of such articles in the composition of the aggregate mass of means, as possess not a permanent, but only a transient existence." (a) But it may happen, as will be shown presently, that opportunities may be so frequently and continuously repeated, as to possess a considerable character of permanence.

Opportunities may be conveniently considered under three divisions: first, such as are presented by mere accident; secondly, such as grow out of existing relations and fore-known circumstances; and, thirdly, such as are created by the act of the criminal himself.

1. The effectual character of an opportunity depends, obviously, upon the fact that the person to whom it is presented is *prepared* to embrace it. Hence, the proper order in which it comes up for consideration, in a chain of evidence, is *after preparations*, and as the closing precedent circumstance introducing the act itself. If an opportunity occurs, before the criminal is finally prepared for it, it is, for the most part, the same as though it had not occurred at all. Hence, mere accident is never a sufficient basis of opportunity, unless in those cases where the party is always on the watch, and ready to act on the instant.

But in those cases where no preparation, or next to none, is required, as in cases of theft, where mere unobserved proximity to the article desired (such article being of a portable kind,) is all the preparation needed, an accidental opportunity may be as effectual as one that has been waited for or actually contrived. In these cases, it may be said that, as soon as the criminal purpose is formed, the party is ready to take advantage of any opportunity that may offer. Indeed, it is possible that there may have been no precedent action of any kind, even mental; and the same

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(a) 8 Benth. Jud. Evid. 189.



circumstance which presents an opportunity, may be that which first excites a motive, and leads to the formation of a purpose. Thus, the sight of an open coffer, with its contents lying in view and within reach, may awaken the first idea of theft, only the moment previous to the felonious abstraction of the money; the criminal purpose being formed and executed almost in the same instant.

2. The next class of opportunities consists of those which arise from the existing relations of the parties; the most prominent of which are those of guest and host, of lodger and fellow-lodger, of master and servant, and particularly the various domestic relations. These constantly serve to bring about that close proximity of persons and property which is of the essence of all opportunity. The position of a traveller, at an inn, places his person and property entirely within the reach of his landlord, and, indeed, often leaves them, during the most unprotected moments, altogether at his mercy. The condition of the guest is always one of trust and confidence, and, in the season of rest, peculiar helplessness; that of the host, on the other hand, is one of activity, vigilance and power, arising from the general knowledge and control he has of the house, and all its inmates and transactions, his own constant and ready means of access to all parts of it at all times, and his facilities for cutting off access to it from without. These circumstances present opportunities and facilities for the crimes of robbery and murder, on the part of unprincipled landlords, which have been taken advantage of in many recorded instances, especially in secluded districts, and during unsettled times. (a) The great motive to crime, in these cases, is

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(a) See, among others, the celebrated case of *Jonathan Bradford*, who was executed at Oxford, for the murder of Mr. *Hayes* in 1736. *Bradford* kept an inn in Oxfordshire, on the London road to Oxford, at which Mr. *Hayes* had put up on the night he was murdered. *Theory of Presumptive Proof*, Appendix, case 7. See also the earlier case of *Moses Drayne* at Chelmsford. 6

the expectation of plunder, which is often awakened or stimulated by the ostentation or imprudence of the traveller himself. (*a*)

The close proximity of one person to another, as lodgers in the same house of entertainment, presents obvious opportunities for crime, growing out of the temporary relation thus created. Thefts upon fellow-lodgers are too common a class of offences at the present day to require further notice. A similar proximity to attractive articles of property is sometimes obtained by workmen, who, from the nature of their employments, gain ready access to the interior of houses, rooms and more private apartments.

Where the relation between the parties, instead of being temporary, like those just noticed, is permanent,—as between master and servant, or between persons constantly inhabiting the same house, opportunities for crime become multiplied; and judicial records show how constantly they are embraced. Thefts and robberies by domestics are of notoriously frequent occurrence. Peculiar opportunities and facilities, even for the commission of higher crimes, are found to exist where the servant occupies a place of especial confidence, being admitted to his master's presence at all hours, and constantly entrusted with the care of his valuables, and almost with the charge of his person. It was this confidential relation that gave opportunity to *Courvoisier* to commit his atrocious murder of Lord *William Russell*, in 1840. (*b*)

Where the relation between the parties is of a still more intimate character, as between members of the same family, and particularly between husband and wife, opportunities

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Lond. Legal Observer, 123. Most of the murders committed by *Burke* and *Hare* in 1828, were committed on the persons of lodgers. Celebrated Trials, 486—488. (Phil. 1835.) See also the case of *Rex v. Burdock*, Best on Pres. § 196.

(*a*) See the cases of *Jonathan Bradford* and *Moses Drayne*, above cited.

(*b*) *Burke's Trials*, connected with the Aristocracy, 461.

for the commission of crimes of the highest grade become indefinitely multiplied. They are, in fact, of hourly occurrence. There exist, in the relation last mentioned, all the elements to constitute the most perfect opportunity that can be desired—unlimited access to the person, and complete seclusion during hours when that person is in its most defenceless state.

Where such intimate relations exist, they afford, especially on the part of the *female*, peculiar facilities for the employment of *poison*, as an instrument of death. From the nature of their household occupations, females are constantly busied in processes, connected with the preparation and service of food, and in offices of attendance upon sickness, which enable them to execute criminal designs in this insidious form, with the greatest effect, and the least possible risk of suspicion. (a) The most notorious poisoners on record have been females. (b)

Another class of opportunities, or rather facilities for the commission of crime, referable to the present head, are those derived from pre-existing and fore-known circumstances. Road-side murders are often committed upon opportunities thus acquired. Having ascertained that the intended victim will pass along a particular road, at a certain hour, the murderer previously secretes himself, with a loaded fire-arm, at a particular spot, and awaits his coming. (c) Poisoners constantly avail themselves of the known or observed ill-health of those upon whom they intend to practice, because the poison may then be more securely mingled with articles intended for their exclusive use. Slight and

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(a) See the cases of *Katharine Nairn*, (19 State Trials, 1285,) and of *Mary Blandy*, (18 *Id.* 1117.)

(b) See the German case of *Anna Schonleben*, in 1808. 3 Lond. Legal Observer, 41, 56. And see the later and more atrocious case of *Gesche Margarethe Gottfried*, in 1828. 4 *Id.* 39, 101.

(c) Trial of *James Stewart*, 19 State Trials, 1, 93. *The State v. Carnwan*, Superior Court of Law, Beaufort County, N. Carolina, Fall Term, 1858.

occasional attacks of sickness are often found sufficient for this purpose. (*a*) But a confirmed state of ill-health, especially where the symptoms and effects of the natural malady resemble, or are undistinguishable from those of the intended poison, presents that peculiar combination of circumstances most favorable to the administration of the destructive agent, with the least hazard of awakening suspicion, as its operation may then be more securely attributed to natural causes. Hence it is a circumstance frequently and strenuously relied on for the defence, in trials for murder by this means, that the health of the deceased was bad, or that he was subject to attacks of a violent character. (*b*)

3. The last class of opportunities for the commission of crime, which remains to be considered, includes those which are created by the *contrivance* of the criminal himself. So far, indeed, are they made the subjects of his voluntary and even industrious action, that they may not improperly be ranked under the preceding general head of *preparations*.

Where a crime is meditated against the *person*, such as murder, robbery or rape, the desired opportunity is often created by decoying the victim within reach, for which purpose various stratagems have been practiced. In Captain *Harrison's* case, (*c*) it was gained by getting the deceased, who was a physician, into a hackney-coach, at night, under the pretext of taking him to see a patient; in *Cunningham's* case, (*d*) by decoying into the chamber of the murderer's wife; in *John Adam's* case, (*e*) by inducing the deceased

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(*a*) *The People v. Green*, Rensselaer Oyer & Terminer, July, 1845. *Commonwealth v. Chapman*, Celebrated Trials, 827, 402. (Phil. 1835.)

(*b*) Case of *K. Nairn* and *P. Ogilvie*, 19 State Trials, 1246—1248. *Id.* 1310—1312. *Rex v. Donellan*, Gurney's Report, 1781. The contrivance of opportunities for the effectual administration of poison, will be more fully considered under the head of "Concomitant circumstances," *post*. Section XIII.

(*c*) 12 State Trials, 833. Burke's Trials, connected with the Upper Classes, 57.

(*d*) 5 London Legal Observer, 42.

(*e*) 11 *Id.* 415.

to take a journey through an unfrequented district ; in the New Jersey case of *Peter Robinson*, (a) by making an appointment with a creditor to call at the debtor's house, and to bring with him all the evidences of his debt, under a promise of a settlement. Sometimes violence has been used to complete the effects of fraud. In Captain *Goodere's* case, (b) the deceased having been gotten into his murderer's hands by a stratagem, was forcibly dragged off through the streets of Bristol, conveyed on board a vessel, and there strangled. In other cases, the victim has been reduced to a state of helplessness or insensibility, by being made to partake freely of intoxicating liquors. Several of the persons

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(a) *Middlesex* (N. J.) *Oyer & Terminer*, March, 1841. See also the case of *Commonwealth v. Webster*.

(b) 17 *State Trials*, 1008. *Burke's Trials*, connected with the Aristocracy. 123. This murder, called at the time "the Bristol Fratricide," is one of the most daring and dreadful crimes on record. The prisoner, who was a captain in the Royal Navy, and an officer of considerable reputation, had been for a long time, on ill terms with his brother, Sir *John Dinely Goodere*, which led him to form the design of taking his life. In order to get possession of the person of the latter, the prisoner pretended to desire a reconciliation, and through the instrumentality of others, a meeting between the brothers was brought about at the house of a friend, in Bristol, on the 18th January, 1741. Soon after Sir *John* left the house on this occasion, he was attacked by a gang of sailors, who had been brought ashore and kept in readiness for the purpose, who seized him, and began to drag him through the streets; the prisoner being with them, and encouraging them. It being in open day, (about half past three o'clock in the afternoon,) the resistance made by Sir *John*, and his cries for help, attracted the notice of several persons, who followed and inquired what was the matter; but they were got rid of, by being told that it was a man who had committed a murder on board the *Ruby*, (which was the prisoner's ship,) and that they were taking him back to the vessel. By this means, they succeeded in getting their victim into the *Ruby's* barge, which had been made ready for the purpose, by the prisoner's direction; and he was then conveyed on board the vessel, (being now represented as a madman, in order to explain his conduct,) locked up in the purser's cabin, and there strangled to death, the same night, by two hired ruffians, the prisoner himself standing sentinel at the door.

murdered by *Burke* and his associates, in 1828, were smothered while in such a condition. (a)

Where the parties reside in the same house, opportunities are often rendered complete by other artifices. In *Patch's* case, (b) the murderer, under the pretence of a short absence from the house, in the evening, contrived, just before the offence was committed, to leave open all the doors communicating with the yard; and having, while out, divested himself of his shoes, was thus enabled to return unperceived and unsuspected, and to get near enough to fire the fatal shot into the parlour where the deceased was sitting, with the greatest effect. In *Donellan's* case, (c) the requisite opportunity of introducing the poison into the medicine which the deceased was in the habit of taking, was obtained by inducing the deceased to place the medicine, which he had previously kept in a private room, in a situation where access could easily be had to it.

But the most remarkable case of an opportunity for the commission of murder, deliberately planned and secured by a series of artful contrivances, is that of the poisoning of Sir *Thomas Overbury*, in the Tower of London, in the year 1633. (d) The death of Sir *Thomas* having been determined on by the earl and countess of Somerset, whose mortal enmity he had incurred, and the particular instrument of destruction having been selected, his person was got possession of, by the following deeply-laid stratagem. He was first recommended to the King, by the person who, under the garb of friendship, was seeking his life, as a proper person to be appointed ambassador to Russia. Hav-

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(a) *Celebrated Trials*, 436—438. (Phil. 1835.) See also the case of *Johnson and Fare*, 5 Lond. Legal Observer, 254.

(b) *Wills*, Circ. Evid. 230, 232.

(c) *Rex v Donellan*, Gurney's Report, 1781. *Celebrated Trials*, 122, (Phil. 1835.) See 8 Benth. Jud. Evid. 66.

(d) 2 State Trials, 911, *et seq.*

ing signified his willingness to accept the appointment, he was next persuaded by the same person to expose himself to the king's displeasure, by renouncing it. For this, as was foreseen, he was committed to the Tower. Measures were then taken, to have a new lieutenant of the Tower appointed, together with a new keeper. Having, by this means, surrounded the victim with persons wholly devoted to their interests, and having cut off all communication between him and the world without, his murderers proceeded to accomplish their design by a series of slow poisons, administered for such a length of time, in so many varieties of forms, and with such unrelenting steadiness of purpose, as to have fully earned for the case and the trials which grew out of it, the emphatic designation bestowed on them by Lord *Coke*, of "the great Oyer of poisoning." (a)

In order to render opportunities for crime efficacious, possession of adequate physical *means* for its commission is, of course, always essential. These means, as a subject of contemplation in connection with *motives*, have already been briefly dwelt on. (b) They have been further alluded to, as objects of acquisition, under the head of *preparations*. (c) They will now be finally considered as subjects of actual possession, ready for use, and kept in store, until the desired opportunity is found to present itself.

X (The possession of physical instruments or means of crime, under circumstances of suspicion, is always an important fact in judicial investigations of its cause.) Its importance, however, depends, in a considerable degree, upon the character of the instruments themselves, and of the person possessing them. Some instruments are of such a kind as to indicate a criminal object *on their face*, being designedly con-

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(a) 2 St. Trials, 929. In this case there were seven distinct trials for murder, in all of which, except one, the accused were found guilty. *Id.* 911—1022.

(b) See *ante*, Section IV.

(c) See *ante*, Section X.

structed for an unlawful purpose, and incapable of any other than an *unlawful* use. Of this description are secret explosive machines, burglars' tools, and implements for counterfeiting and coining money; (a) which no honest or well-disposed person can be supposed to have any motive for possessing. [Secret implements of assault and mischief, and dangerous weapons expressly proscribed by law, (b) appear to come under the same head. The finding of these in the possession of an accused person, unless such possession is shown to have been the result of accident, or the intentional act of another, is always a strong circumstance to show guilt.] Poison is an instrument of mischief peculiarly susceptible of an unlawful use, though not so exclusively or uniformly, as the instruments just mentioned; it being frequently employed in families, for the destruction of noxious animals and other household purposes. The *mere possession* of poison, therefore, in the absence of other criminative circumstances, is a fact of small importance. Where, however, it is found to have been so procured and left, or to be so prepared and disposed, as to raise a presumption that it was intended to be taken by, or administered to a human being, it assumes a very different and far more important character. Fire-arms, knives and other deadly weapons indicate their intended uses still less conclusively than poison, being constantly kept in the possession of the best disposed persons, and admitting of many innocent and lawful applications.

The inference deducible from the possession of the means of crime depends also, in a material degree, upon the character, station, and even sex of the *person* with whom they

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(a) The possession of a die, or other instruments for coining money, with an intent to coin such money, is a misdemeanor at common law. *Murphy's case*, 4 Rogers' City Hall Recorder, 42. *Dorset's case*, 5 *Id.* 77. And see the English statute, 2 William IV., c. 34, s. 10. Roscoe's Crim. Evid 400.

(b) The keeping or carrying of slung-shot was made a distinct indictable offence in New York, by Act of April 7, 1849. Session Laws, 1849, p. 408.



are found. Thus, the possession, by a locksmith, of implements for picking or opening locks, and of moulds for making keys, being in the ordinary course of his calling, would not even awaken suspicion of any unlawful purpose. The same would be the case with poisonous materials found on the person or premises of a physician, druggist or chemist, who deal frequently or habitually in such substances. (a) So, the mere possession of counterfeit notes or coin may, in the case of most persons, be an innocent or indifferent circumstance; any person being liable to receive an occasional spurious note or coin, in the course of dealing with others: while, in other cases, as where the possessor is proved to be of bad character, or is found in close connection with known counterfeiters, or utterers of counterfeit money, it may amount, in itself, to a positive statutory offence; the intent to pass the money being inferred from the attending circumstances. (b) So, the possession by a female, of a loaded pistol or razor, might be a circumstance of a highly criminative tendency. (c)

Another circumstance tending to throw light on the object with which instruments of mischief are procured or kept, is the exhibition of any desire or attempt to *conceal* them. In *Mary Blandy's* case, the poison was disguised under a false name. (d) In *James Hill's* case, the incendiary contrivances were covered up in various ways, the prisoner frequently changing his lodgings. (e) In other cases, fire-arms have been found hidden in haystacks and other by-places. (f) Implements for counterfeiting and counterfeit money are always concealed by those who keep them for use, with the

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(a) See Wills, Circ. Evid. 46.

(b) *The People v. Gardner*, 1 Wheeler's Crim. Cases, 23. See 2 New York Revised Statutes, [674] 858, 859, §§ 86—38. (4th ed.)

(c) The finding of a smith's vice in the possession of a woman, would be a suspicious circumstance. *Rex v. Heath and Crowder*, Wills, Circ. Ev. 98.

(d) See *ante*, p. 349.

(e) 20 State Trials, 1817.

(f) *Rex v. Howe*, Wills, Circ. Evid. 234.

greatest care. This concealment, however, is not peculiar to *preparations* for crime, but also takes place (and perhaps more uniformly,) *after* the offence has been committed; as will be fully considered under a future head. (a)

The possession of the means of crime becomes a more forcible indication of a guilty purpose, if false reasons are assigned to account for it; as, in the case of possessing poison, that it was procured to destroy vermin. (b) This common pretext, together with others, has been already adverted to.

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## SECTION XII.

### *Attempts to commit crime.*

The last link in the chain of precedent circumstances which have been mentioned as tending to connect a crime with its perpetrator, consists of actual *attempts* to commit it. These leave no room for doubt as to the motive or purpose of the party by whom they are made. They stop short only of the actual perpetration of the crime itself, and, in some cases, constitute in themselves a species of criminal offence, though of a grade inferior to that of the offence intended. (c)

Attempts are also important circumstances, where a subsequent fatal or injurious act has been committed by the same person, to determine its legal character. Thus, on a

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(a) See *post*, Section XVII. and Section XVIII.

(b) Wills, Circ. Evid. 46.

(c) See Wharton's Am. Crim. Law, book 6, c. 15, p. 871. (ed. 1855.) 2 New York Revised Statutes, [698, 1881, § 8. (4th ed.)

charge of maliciously shooting another, where it was questionable whether the act proceeded from accident or design, the fact that the accused had intentionally shot at the same person, a short time before, goes strongly to show that the shooting in the second instance was intentional. (a) This branch of the subject has already been considered under the previous head of *motives*. (b)

The criminative force of evidence of attempts becomes vastly increased, where they appear to have been often *repeated* by the same person, either in the same or a different form. In Mrs. *Arden's* case, (c) an attempt was first made to destroy the deceased by poison, which his wife administered to him in some milk, and from the effects of which he had a very narrow escape. Several other attempts were then made by the aid of a hired desperado, before the criminal purpose was accomplished. In the case of *Commonwealth v. Hauer*, (d) attempts appear to have been made to poison and to hang, before the final assault with pistol and axes.

In concluding the present division of the subject, it may be observed generally, that the several precedent circumstances which have just been considered, taken in the order in which they have been arranged, serve to illustrate, with much force, the entire progress of criminal affection, from the moment it first obtains a lodgment in the mind, to that of conceiving a distinct criminal purpose, and carrying such purpose into full effect. Where they are all shown to co-exist, in any particular case, they furnish the most complete basis of preliminary evidence that can be made out against an accused party. But they are not all of equal weight or

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(a) *Reg v. Voke*, Russ. & R. Cr. C. 658.

(b) See *ante*, p. 811.

(c) 5 London Legal Observer, 59.

(d) 2 Chandler's Am. Criminal Trials, 363, 365.

importance. Motive, means and opportunity, (either actually shown or effectually inferred,) are the only circumstances in the series, which may be pronounced essential as elements of criminative evidence. The others may or may not co-exist with them. A crime may be satisfactorily proved, and yet no previous declaration, preparation or attempt, by the accused, be shown. Indeed, there are few cases in practice in which all these circumstances are found to occur together. They are met with, in combinations varying constantly, according to the case and the crime. In murder and arson, the combination is most apt to be complete ; yet, in some murders, there is no verbal expression of animosity, or declaration of intention whatever ; in others, no preparation, or only that of the most hasty kind. In burglary, robbery, forgery and theft, verbal indications of purpose are never met with.

## SECTION XIII.

*Concomitant Circumstances.*

The next division of circumstances, to be considered in treating of that kind of circumstantial evidence which is derived from the conduct and relations of the accused party, as serving to connect him with a crime committed, comprises those which actually *accompany* its commission. These are, usually, of a much more important and decisive character in establishing special criminal agency, than those which have just been considered, under the distinctive title of precedent circumstances, inasmuch as they, for the most part, constitute portions of the *res gesta*, or transaction itself. And this division may, without impropriety, be extended so far as to include not only those circumstances which are strictly contemporaneous with the criminal act, but those also, which *immediately* precede and follow it.

The great leading circumstance of this class, the one which first occurs for consideration, and the one of which evidence is always specially sought, is that of *presence*, on the part of the accused, at the scene of crime, or company or juxta-position with the subject of it, at the time of its commission ; or, at least, of *proximity* or *vicinity* of the accused to the scene or subject of the crime, about such time. (a) This circumstance, in connection with others, and sometimes with the aid of a very few others, is constantly employed as a means of establishing, by a necessary

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(a) Proximity, in point of time and space, to the scene or subject of a crime, has been classed by Mr. *Starkie*, among *physical* or mechanical coincidences; and, so far as persons are considered as material objects, the classification is undoubtedly correct. 1 *Stark. Evid.* 484, 485. But, as a circumstance indicative of *conduct*, in which character it possesses great prominence, it belongs to the class of facts or circumstances designated, in the present work, by the term "moral."

or a reasonable inference, the presumption of his agency or participation in the criminal act.

In the crime of murder, which occurs first for consideration, this important fact of presence or vicinity is deduced from a variety of circumstances, constituting presumptions of various degrees of force, according to the case. The strongest form of presumption against a person accused of this offence, arises from circumstances which, while they show his presence at the scene of crime, at the time of its commission, *exclude*, at the same time, the supposition of the presence of any *other* person; leading, in fact, rather to a necessary conclusion than to a presumption, in the proper sense. The force of the evidence, in these cases, consists in the concurrence or coincidence of the three leading circumstances of person, time and place. The closer these are brought to the subject of the crime, the stronger their effect to demonstrate the presence of the accused, and to show such presence to have been exclusive.

Proximity, on the part of the accused, as thus presented for consideration, may be, in itself, of various degrees, from mere vicinity, up to actual juxta-position or contact. It may also be of various kinds, such as proximity to the person of the deceased, or to the scene of the crime, or to both; and it may exist at different stages; as before the commission of the crime, or afterwards; or both before and after. And the effect of this circumstance is the same, whether it grows out of the immediate act of the accused, or out of that of the deceased himself; as where the accused is not seen at all, but is known to occupy premises which the deceased is observed to approach or enter.

The strongest form in which this circumstance can be presented, and the one which requires the least reasoning to give it effect, is undoubtedly that of the juxta-position of the persons of the accused and deceased, proved, by actual observation, to have existed both immediately *before* and

immediately *after* the crime is perpetrated. These show presence at the moment of actual perpetration, with the greatest effect possible, short of direct evidence ; and they may be so connected by the circumstances of time and place, as to have the full *exclusive* operation just mentioned. For example,—two persons are seen alive together in a room having but one means of entrance or exit ; and an alarming sound or outcry is heard, and the room is immediately entered ; and one of the persons is found dead or dying from a mortal wound or stroke, and the other standing near him ; and no other person is seen. Here, the immediate entry, in connection with the physical character of the place, would demonstrate the impossibility of the presence of any third person ; and, assuming a *corpus delicti*, or that it is, in fact, a case of murder, the perpetrator would be as clearly indicated by the mere force of the circumstances, as if he had been seen to inflict the wound ; the case being one of circumstantial evidence of the *certain* kind. The circumstance of *time* is here of the utmost importance ; for if the room were not entered immediately, but only after an interval sufficient to allow the escape of another person, the *exclusive* character and effect of the circumstances would be destroyed. This may be illustrated by the well-known case of *Jonathan Bradford*, (a) in which the person who committed the murder found means to escape from the chamber of the deceased, only the instant before *Bradford* entered it.

The character of the *place*, also, is essential to the exclusive effect just mentioned. If it were a house, with distinct entrances, and the usual variety of apartments, admitting of at least the temporary concealment of a person, the mere facts that two persons were seen alive in it, just before the murder, and that, upon entering, one of them was found dead, from a mortal wound, would not, of themselves, authorize the inference that the other had killed him ; even though

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(a) Theory of Presumptive Proof, Appendix, case 7.

no other person was found in the house, and though the front entrance had been carefully watched, up to the time of entry, and no one had been seen to go in. (a)

Lord *Coke's* example of a violent presumption is of a *house* in which a man is run through with a sword and dies, and another is seen coming out of it with a bloody sword; and *no other person was at the time in the house.* (b) The particular circumstances, indicative of this last fact, are not stated; but the fact itself is assumed in its broadest form, and it undoubtedly constitutes the foundation of the presumption spoken of. Where this fact is clearly *proved*, it is not indeed, necessary that the persons of the accused and deceased should be actually seen *together*, either before or after the commission of the crime. If they were in different parts of the same house, it would be sufficient; or even if

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(a) Want of attention to these considerations resulted in the conviction and execution of an innocent person, in a case which is said to have happened at Dublin, more than a century ago. It was not really a case of murder, but of accidental, though most singular death. The person who witnessed it, and who had been admitted into the house by a *back entrance*, had tried to staunch the fatal wound; but finding this ineffectual, and hearing the sound of approaching footsteps, and being fearful of the consequences of being found alone with the dead and bleeding body, concealed himself in the house, behind the front door; and as soon as a crowd of persons had collected, on hearing the alarm, mingled with them. By this means he succeeded in escaping into the street, unobserved, and hurrying immediately to the quay, got on board an American vessel, and left the country in a few hours. On searching the house, no one was found but the occupant, a surgeon of high standing and blameless character. But the death appearing to have been produced by a surgical instrument found near the body; and a bloody shirt marked with the surgeon's initials having been found concealed in the coal-hole; and a female who lived in the opposite house having declared that she had watched the house all that day, and that no one left or entered it that day but himself; these circumstances, together with the surgeon's agitation on seeing the body, were made the foundation of a charge of murder against him. The facts were proved on the trial, and no defence being offered but a simple denial of guilt, the accused was convicted and executed. See an article in the *New York Albion*, October 28th, 1854.

(b) Co. Litt. 6 b. See *ante*, p. 61.



the accused were only seen entering the house just before, and coming out of it immediately after ; or only in the act of coming out, as in Lord *Coke's* example.

It is seldom, however, that cases occur, presenting merely these leading circumstances of personal proximity, time and place. On the contrary, they are almost uniformly associated with other minor circumstances, immediately precedent or subsequent, or both, which have the double effect of proving a *corpus delicti*, and fixing the guilt of it upon the particular party whose exclusive presence is shown. As where a person is seen going into the apartment of another, with a loaded pistol ; and, soon after, a shot is heard from within ; and the apartment is immediately entered, and the occupant is found dead or dying from a mortal wound ; and the other person is seen standing near, with a discharged pistol ; and the wound is conclusively shown to have been inflicted with a pistol in the hands of some other person than the deceased ; and no third person is found in the apartment. (a)

The next form of personal juxta-position, from which a presumption of guilt may be deduced against an accused party, is where it is observed to exist only *after*, and not before the commission of the crime. As where a man is found in a house, or in the open air, recently dead or dying from a mortal wound ; and another is seen standing

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(a) In a case tried in Indiana in 1820, the facts were similar, but still more conclusive. The prisoner, having loaded a pair of pistols, and placed one in each pocket of an overcoat, which he had put on for the purpose of concealing them, followed the deceased to his office-door, waited until the latter unlocked the door and entered, and then went in after him. In less than a minute, a pistol-shot was heard, and, the room being immediately entered, the deceased was found on the floor dying, and the prisoner standing beside him ; the room being filled with smoke and the smell of powder. The pistols were found lying on the counter ; one discharged of its contents, the other still loaded. The prisoner, on being interrogated, acknowledged his guilt, and said he gloried in the deed. *Commonwealth v. Fuller*, Lawrenceburg (Indiana) Circuit Court, March, 1820. 2 Wheeler's Criminal Cases, 223.

by him, or stooping over him, or busied about him, or even just leaving him. If the circumstances of time and place concur (as they may,) in excluding the presence of any other person, the result would be the same as in the preceding description of cases; a previous juxta-position being necessarily inferred. Lord *Coke's* example is of a person *escaping from* a house in which another is found dead by violence; and yet it assumes an exclusive presence. *Bradford's* case was one of subsequent actual juxta-position of persons, belonging strictly to the division now under consideration. He was found at the side of the bed on which the murdered man lay, stooping over him. But in these cases, there are usually accompanying circumstances, affording coincidences and leading to inferences which serve, in a greater or less degree, to strengthen the presumption of guilt. Lord *Coke's* example represents the escaping party as having *a bloody sword*; the person in the house having been slain with such a weapon. *Bradford's* case presented the accused in the very attitude described by the ancient English law,—standing over a dead man, with a bloody knife, (*super mortuum cum cultello sanguinolento*,) (a) his

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(a) The ancient rule, as to the effect of a man's being found in this situation, and of being found alone in the same house with a dead person, has already been considered. (See *ante*, p. 62, note (d)). With all the severity of this rule, the great force of the circumstances from which it was deduced, has been attested by the common experience and practice of mankind in all ages. There seems to be a sort of instinctive dread, from which the innocent are not always exempt, of being found alone, especially in a house, with the body of a person just dead by violence, or even presenting the appearances of such a death. Guilty persons constantly evince this feeling, by either flying precipitately from the spot, or, where this is impossible, by hiding or removing the body itself. Indeed, so decisive is this circumstance felt to be, that rather than suffer the body to remain on the premises of the murderer, the latter will sometimes adopt the hazardous expedient of carrying it out into the open street or field, where detection of the crime is sure to take place, and connection with the criminal almost equally sure to be established. (See the cases of *Mrs. Arden*, 5 Lond. Leg. Observer, 59; and of *The People v. Johnson*, 2 Wheeler's Crim. Cases, 361.) Even the innocent have been known to consult

hands also being bloody; and these facts doubtless had a controlling influence in bringing about his conviction; although the fundamental criminative fact of an *exclusive presence* was not shown, and did not, in truth, exist.

There is an important class of cases which may be referred to this head, where a degree of proximity, approaching or amounting to juxta-position, has been observed after death, but which, as observed, is not personal but local, justifying, however, and sometimes requiring the inference of its having been personal; as where the body of the deceased, or its remains, have been found on premises inhabited or occupied by the accused, or proved to have been upon such premises shortly after the commission of the crime. These cases are, in the abstract, liable to the general infirmative supposition that the body or remains may have been purposely placed in this situation by a third person,—the real perpetrator of the crime,—with the view of fixing suspicion on the occupant of the premises. But they may be attended by circumstances which effectually negative this supposition, by excluding the presence and agency of any other person than the accused; as where the body or remains are found in a part of the premises to which the accused alone had access. In *Robinson's* case, (a) the body of the deceased was found buried under the basement floor of the prisoner's own house. In *Webster's* case, (b) portions of the remains were actually found under the prisoner's private lock and key. In *Colt's* case, (c) the box enclosing

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their own safety by similar methods, and sometimes with the most deplorable consequences to others. (See the case in the note, *ante*, p. 371.) The true mode of escaping the dreaded imputation, where it is, in fact, unfounded, was indicated by the old law,—instantly raising the "hue and cry;" equivalent, in modern practice, to giving the alarm, or making the fact publicly known.

(a) *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841. Pamphlet Report, 8, *et seq.*

(b) *Commonwealth v. Webster*, Bemis' Report, 117, 118, 120, 146, 157.

(c) *The People v. Colt*, New York Oyer & Terminer, January, 1842; testimony of *Richard Barton*.

the body was not found on the premises of the accused ; but it was directly traced there, and proved, beyond doubt, to have been there for some hours. Indeed, the accused himself had it taken out and placed upon a cart, and superintended, in person, its transmission to the vessel on board of which it was found ; thus establishing, by necessary inference, the fact of a personal juxta-position of the very strongest kind. Cases of this kind also involve the necessity of a proximity on the part of the *deceased*, while living, to the premises which were the scene of crime ; and frequently such proximity becomes the subject of actual observation and evidence. In all the cases last referred to, the deceased, when last seen alive, was seen in the act of approaching or entering the premises of the accused, and was never seen to come out again. This circumstance is often of the greatest importance, first, as tending to supply any deficiency of proof of the identity of the body, where the head or face has been destroyed or mutilated ; and, secondly, as aiding to rebut the infirmative supposition that the deceased was killed by some other person.

The next form of actual juxta-position of the persons of an accused and deceased individual, from which a presumption of guilt may be deduced, is that which has been observed to exist only *previous* to the commission of the crime ; as where the body of a murdered person is found in a building, or in the open air, and no one is or has been seen near it ; but, some time before the body is found, or the crime ascertained to have been committed, the deceased was seen in company with the accused, and not far from the spot. The criminative effect of these circumstances is dependent, as in the cases before considered, upon those of time and place ; or, in other words, upon the distance from the point where the parties were observed, to that where the body is found, and the length of time which may have intervened. These intervals may be so short as to render the supposition of the

intervening presence of a third person extremely improbable ; but it is seldom that they have the positively *exclusive* effect noticed in the preceding classes of cases. The circumstance of previous personal juxta-position is, however, always an important one in itself, as furnishing a starting point of investigation, and a means of arriving at the knowledge of other circumstances. Hence, where a person has been found dead by violence, and no one near the body, or has suddenly and unaccountably disappeared, the first inquiry which naturally suggests itself, and the one which, in fact, is always made, is—"In *whose company* was he *last seen alive*?" In *Corder's* case, (a) the deceased was last seen walking with the accused towards a barn, under the floor of which the dead body of the former was afterwards found buried. In *Johnson's* case, (b) the deceased was last seen alive in company with the prisoner, at the door of the latter's house, within which abundant physical evidences of the murder were discovered. In the celebrated case of *Spencer Cowper*, (c) much stress was laid on this circumstance to criminate the accused. He was visiting the deceased at her mother's house, and the two were seen in company, in a lower room, until a late hour. The maid of the house having gone up stairs, heard the front-door shut to, and, on coming down, found that they had both gone out. The deceased did not return home that night, and, the next morning, her body was found in a stream not far from the house, with appearances which were thought to indicate a violent death from the hands of another. But the doubts which arose on this point, together with the high standing of the accused, operated to produce a verdict of acquittal.

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(a) *Rex v. Corder*, Celebrated Trials, 215. (Phil. 1835.)

(b) *The People v. Johnson*, New York Oyer & Terminer, March, 1824; 2 Wheeler's Crim. Cases, 374, 375. In *Eugene Aram's* case, the prisoner and one *Houseman* were the persons last seen with the deceased.

(c) 13 Howell's State Trials, 1105, 1112, 1113.

In *Thornton's* case, (a) the prisoner and the deceased were seen walking together, at a very late hour of the night on which the latter came to her death ; and they were proved, by the physical evidence of foot-prints, to have been in the same field with the pit in which the dead body was found, and in the immediate vicinity of such pit. But the evidence as to the important circumstance of *time*, failed to give to the facts their full criminative effect ; and upon this ground, together with a doubt as to the *corpus delicti*, the accused was acquitted. (b)

We come next to that description of cases in which no actual juxta-position of persons has been observed, either before or after the commission of the crime, but only *proximity* to the scene of crime, of various degrees of closeness ; and this proximity may be either on the part of the subject of the crime, or of the supposed perpetrator. Where a homicide has been committed on premises occupied by the accused, which the deceased had been induced to visit, the proximity requiring most attention is that of the *deceased* to such premises ; proximity on the part of the accused being either necessarily or reasonably inferable from the fact of occupancy itself. The importance of this fact, in connection with that of finding the body or remains of the deceased on such premises, has already been considered.

But the species of proximity which it most frequently becomes necessary to investigate, particularly in accusations of murder, is that of the *accused* to the scene of the crime ; whether it were the house of the deceased himself, or of some third person, or in the open air ; and whether before or after the commission of the crime, or both ; and this may

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(a) *Rex v. Thornton*, Celebrated Trials, 97.

(b) For other cases in which the deceased was last seen alive in company with the accused ; see *Bell's* case, 1 London Legal Observer, (Monthly,) 818. *Johnson and Fare's* case, 5 Lond. Leg. Observer, 254. *John Adam's* case, 11 *Id.* 415.

be of very various degrees. In *Barbot's* case, (a) the prisoner was not observed on his way to the scene of the crime,—the time being a late hour of the night ; but he was seen, the next morning, returning from the spot in a canoe ; and was satisfactorily traced all the way to his home. In *Stewart's* case, (b) the accused was seen in the neighborhood of a ferry over which the deceased was expected to pass, inquiring of the ferry-man, if he had passed. Soon after the deceased had come across the ferry, he was shot and killed by some person concealed in a wood through which the road lay ; and, a few hours afterwards, at night-fall, the accused was seen and spoken with, on a hill just above the spot. In *Harrison's* case, (c) the prisoner had been seen, at a late hour of the night, in a hackney-coach in which the deceased was soon after found strangled. In *Richardson's* case, (d) the prisoner was seen by a person not far from the house, in which the deceased was, on the same morning found murdered, running towards it. In *Howe's* case, (e) the prisoner had been seen on the road leading to the spot where the murder was committed, and not far from it, about the time of its commission ; and, about an hour after, was seen going in great haste from the spot, in a different direction. In *Carawan's* case, (f) the prisoner was seen to leave his house, soon after the appearance of the deceased on the road leading by it, and to go across a field in the rear of his premises, to a point where a range of woods began, which included the spot where the body of the deceased was afterwards found. The report of a gun

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(a) *Rex v. Barbot*, 18 State Trials, 1271—1276.

(b) *Rex v. Stewart*, 19 *Id.* 98, 108, 109. The principal criminal in this case escaped, and was not tried.

(c) *Rex v. Harrison*, 12 State Trials, 849, 850.

(d) See *ante*, p. 245.

(e) *Rex v. Howe*, Wills, Circ. Evid. 286.

(f) *The State v. Carawan*, Superior Court, Beaufort County, (N. C.) Fall Term, 1858; Pamphlet Report, 44, 51, 52.

was heard, not long after, and the prisoner subsequently returned to his house. In *McCann's* case, (a) the prisoner was seen taking the same road with the deceased, who was riding home, and keeping in his rear, until near dark, when he left the road. A pistol-shot was heard soon after; and, the next day, the body of the deceased was found in a clump of bushes, not far from a private road leading from the public road on which both the parties had been seen. In both these cases, as well as in the later case of *Wood*, the proximity observed was to the person of the deceased, as well as to the scene of the crime. In *Wood's* case, (b) the deceased was seen on the road, resting against a fence, and the prisoner about forty yards off, approaching him.

The next and last description of cases remaining to be considered under the present general head, embraces those in which such care has been taken by the criminal to avoid observation, that he has not been seen, either at or near the scene of the crime, or going towards it, or going from it, but his proximity, and indeed his presence are *inferred* from his movements at other points, before and after the crime was committed; as where, on the same night with the commission of a murder, the accused was known to have absented himself from his house or lodgings;—the interval of his absence corresponding with the time at or during which the crime is known to have been perpetrated. In *Rush's* case, (c) the prisoner left his house in the evening, not long before the deceased who lived in the neighborhood, was shot, and returned at about nine o'clock. The facts stood in a similar relation in the late American cases of *The People v. How*, (d) and *Commonwealth v. Spring*. (e) An

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(a) *The State v. McCann*, 13 Smedes & Marsh. 476, 477, 478.

(b) *The People v. Wood*, Greene (N. Y.) Oyer & Terminer, Nov. 1858.

(c) *Regina v. Rush*, Burke's Trials, connected with the Upper Classes, 495.

(d) 2 Wheeler's Crim. Cases, 412.

(e) Philadelphia Crim. Court, March, 1858.



interval of absence even by day, from the party's place of business, or place of work in the open air, where it corresponds with the time of the commission of a crime in the vicinity, will justify a similar inference as to his probable participation in it. In *Richardson's* case, (a) where the murder was perpetrated in open day, the time of its commission was found to correspond accurately with the interval during which the accused had been absent from his fellow-workmen on the same forenoon. And, where the time of the perpetration is ascertained with any precision, the shorter the interval of absence is, provided it admits of the possibility of the accused being concerned in the act, the greater its force as a ground of inference against him. In the case last mentioned, it was narrowed down to the short space of half-an-hour.

The weight and force of facts like these, when considered by themselves, consist merely in the coincidences and correspondences of *time* which they present; rendering the fact of presence *probable* in various degrees, but possessing no *exclusive* efficacy, like that adverted to under previous heads. To give them any degree of probative force, they must be considered in connexion with other contemporaneous facts; and, indeed, the classes of cases previously noticed, where an actual proximity to person or place has been the subject of observation, often require to be strengthened from these sources, and, with such an accession, become, through the process of inference, convincing, in a very strong degree. A false excuse given as a reason for the coincident absence, serves to impart to the latter circumstance a criminative aspect which it otherwise would not possess. (b) But the two leading circumstances most relied on for this corroborative effect, are those of *haste* and *secrecy*, on the part of the accused. at the times noticed. In *Barbot's*

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(a) *Ante*, p. 245.

(b) Thus, in *Richardson's* case, the reason given by the accused for leaving his companions, was that he wanted something at a smith's shop, which stood

case (a) the prisoner clandestinely left the house at which he was staying, at a late hour; and, about midnight, a horse was brought to a public house at some distance, where he stopped, the next morning on his return, and rode home. In *Stewart's* case, (b) one of the accused parties, when seen before the criminal act, appeared to be avoiding observation, as his manner in interrogating a ferry-man strongly showed. (c) His conduct afterwards, in remaining out of doors, in solitary places, even at night, not venturing into houses, even to converse with their inmates, but calling them out, and conversing under the cover of darkness, was of a corresponding character. In *Richardson's* case, (d) the prisoner took a different course in leaving the house where the crime was committed, from that by which he approached it, and by that means contrived to escape unseen; but the prints left by his feet revealed his movements with the greatest distinctness, showing also the very important fact that he had *run from* the house, as well as towards it. In *Carawan's* case, (e) the prisoner not only took a circuitous course, in leaving his house, in order to avoid being seen with a gun, but gave the gun to his wife, who followed him, to carry; but her precautions to conceal it under her apron were not sufficient to prevent its being seen. In *McCann's* case, (f) soon after the report of the gun was heard, a horse was heard by one witness, galloping from

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at some distance; although it did not appear that he had any occasion to go there. See *ante*, p. 244.

(a) 18 State Trials, 1259, 1269.

(b) 19 *Id.* 108—111.

(c) The ferryman testified that, as he was sitting near the ferry of Ballachelish, with another person, the accused came behind them and hoasted, [coughed,] and upon deponent's looking about, desired him to come to him, which the deponent did, and the accused enquired of him, if *Glenure* had crossed the ferry. *Id.* 108.

(d) See *ante*, pp. 243, 245.

(e) *The State v. Carawan*, Pamphlet Report, 51, 52.

(f) *The State v. McCann*, 18 Smedes & Marshall, 478, 480.

that direction towards the prisoner's residence ; and, it being moonlight, both horse and rider were indistinctly seen by another. In *How's* case, (a) the prisoner was observed by those who saw him just before the murder, with something resembling a stick concealed under his great coat ; his manner also appearing strange. About midnight, a man of the prisoner's size passed one of the witnesses, on horse-back, going in a direction towards the house of the deceased ; and, about half-an-hour afterwards, a man passed back, riding with such speed, that the witness supposed he was going for a physician. On going, soon after, to the prisoner's stables, one of his horses was found wet and smoking, as if lately ridden ; and a short rifle was found in the house, with a horse-hair under a piece of the mounting. In *Rush's* case, (b) the prisoner had left his house by a back way, and on his return exhibited such an appearance of paleness and agitation, as to draw from the woman with whom he lived, the emphatic exclamation, "For God's sake, what have you done ?"

Evidence of the leading circumstance of *proximity* or presence, which has just been considered ; when presented by the testimony of eye-witnesses, obviously involves that of the *identity* of the person seen, with the accused or deceased, as the case may be. Where such person is known to the observer, or his face has been distinctly seen long enough to impress the memory, such identification is made by the witness swearing positively that he was the man. In other cases, it is proved by evidence of circumstances from which the identity may be inferred ; such as stature, size, dress, voice, manner and the like. In *Harrison's* case, (c) the accused was identified by the peculiarity of his voice ; in

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(a) *The People v. How*, 2 Wheeler's Crim. Cases, 417—419.

(b) *Regina v. Rush*, Burke's Trials, connected with the Upper Classes, 495, 496.

(c) 12 State Trials, 888, 850, 861. See also the case of *Charles White*, 17 *Id.* 1034.

*Rush's* case, (*a*) by the circumstance of carrying his head on one side. In *Barbot's* case, (*b*) the prisoner was identified by his diminutive size and peculiar dress, and he was traced by these very noticeable circumstances, on his return from the scene of the crime, in the most satisfactory manner. In the American case of *Ephraim K. Avery*, (*c*) much evidence was offered to show that a person resembling the accused, in stature and dress, was seen in the neighborhood of the stack-yard in which the deceased was found hung to a stake, on the evening during which the occurrence took place.

This circumstance of proximity, and that of presence as inferred from it, may also be made out by that class of facts called *physical*, which have already been considered; as by foot-prints of a peculiar kind, found in the vicinity of the scene of the crime, and proved by comparison to have been made by the feet of the accused. (*d*) And this kind of proof is sometimes more accurate, reliable and decisive than that by eye-witnesses, especially where the party was seen under circumstances not admitting of accurate observation. Correspondences between destructive weapons or instruments, seen in the hands of the accused before or about the time of the commission of the crime, with those found upon or near the body of the deceased, or with the appearances of such body, may also be classed under this head: such as the correspondence between the bloody sword, in the hands of the person mentioned by Lord *Coke*, as escaping from a house, with the recent wound made by

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(*a*) *Regina v. Rush*, *Burke's Trials*, 488.

(*b*) 18 *State Trials*, 1271—1277.

(*c*) *The State v. Avery*, before the Supreme Court of Rhode-Island, May, 1833. In this case, the accused, after a trial of unprecedented length, was acquitted. But the case itself is a most instructive one, as exhibiting a great variety of circumstantial evidence, laboriously collected and very skillfully combined.

(*d*) *Rex v. Richardson*, *antc*, p. 244.

such an instrument on the person found within ; (a)—the correspondence between a peculiar kind of charge, (two bullets and a slug,) taken from the body of the murdered person, with the same description of charge known to have been put into a gun previously borrowed by the accused ; (b) the latter species of evidence operating to establish actual identity. The whole subject of identification will be considered under a separate head hereafter.

In the class of cases last mentioned, where the accused has not been seen at or near the scene of the crime, or approaching it, or leaving it, and no physical evidences of his presence are discovered ; but that circumstance has only been *inferred* from his previous and subsequent movements ; it is always an essential condition to the soundness of such inference, that the circumstances of *time* and *space*, covered by such interval, should be carefully taken into view, and found to be entirely consistent with it, and with each other. If it clearly appear that the place where the crime was committed was so distant from the residence of the suspected person, or from the point at which he was last seen, previous to its commission, that it could not be reached by him in time for its commission ; or, supposing it possible for him to have reached it, if there was not time enough during the interval of absence proved, for him to have visited the spot, committed the crime, and returned to his residence, or reached the point where he subsequently appeared to view, the value of the evidence is at once destroyed. This was the principal ground on which the acquittal of the prisoner in *Thornton's* case (c) was rested, and has been justified ;

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(a) Co. Litt. 6 b. *Ante*, p. 61.

(b) Major *Strangways'* case, 5 Lond. Legal Observer, 90. In *Corder's* case, the prisoner was seen with a loaded pistol, while in company with the deceased, on the last day she was seen alive. Celebrated Trials, 218. (Phil. 1835.)

(c) *Rex v. Thornton*, Warwick Autumn Assizes, 1817. See Wills, Circ Evid. 142—144.

although some of the accompanying facts were of a highly criminative character and tendency.

It most commonly happens, however, that the circumstances of time and place do not indicate a conclusion favorable to the accused, in this palpable and summary form, but only raise the question whether it were possible for the accused to have traversed the space supposed, during the interval of time shown. This question was formally raised in *Cowper's* case. (a) It came also under consideration in the case of *The State v. Avery*. (b) And it was made the subject of special and earnest argument in the recent case of *The State v. Carawan*. (c)

The determination of questions of this character depends upon a variety of accompanying circumstances, which will now be briefly noticed. In the first place, it obviously and essentially depends upon the *rapidity* with which the accused was seen or known to have been moving at the time ; or his facilities for rapid motion ; as whether he was walking or running, whether he was mounted, or on foot. In *Richardson's* case, (d) the interval during which the prisoner had been absent from his companions, on the morning of the murder, was a short one of only half-an-hour, so short, indeed, that it at first escaped their recollection ; but it was proved that he had *run* both in going towards, and in returning from the house in which the murdered person was found ; and this fact served to render the supposition of his presence a reasonable and probable one. In *How's* case, (e) the prisoner rode a horse, which, on his return home, he urged

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(a) 13 State Trials, 1177, 1178.

(b) Supreme Court of Rhode Island, May, 1883.

(c) Pamphlet Report of Trial, 81—84.

(d) *Ante*, p. 243, 245.

(e) *The People v. How*, 2 Wheeler's Crim. Cases, 417.

to its utmost speed. In *McCann's* case, (a) the accused was mounted, and shown to have rode at a gallop from the spot where the shot was heard in the night, and the body found the next day.

Another important circumstance to be considered in determining questions of this kind, is the *character of the ground* requiring to be traversed during the interval of time assumed. If, instead of being plain and open, it were impeded by natural obstacles, such as woods, thickets and the like, rendering rapidity of movement less practicable, an expenditure of more time would, of course, be called for. (b) But the effect of this circumstance, again, would depend, in a material degree, upon the acquaintance of the party with the ground traversed, and upon his physical powers of contending with the obstacles he might encounter.

In the late North Carolina case of *The State v. Carawan*, the guilt of the prisoner came to turn upon a question of the kind which has been mentioned; and the question itself was thoroughly considered, under the different aspects just indicated. The prisoner had been seen to leave his house, soon after the deceased passed it on the road, and to go across the fields in the rear of his premises, to a point of woods, running for the most part in the same general direction with the road, followed by his wife, the latter carrying a gun. The hypothesis, on the part of the state, was that the prisoner took this circuitous course in order to avoid observation, and that having, by this means, reached a point on the road, in advance of the deceased, he concealed himself near the road-side, and, as the deceased passed, shot him. To rebut this view of the case, it was contended, on the part of the prisoner, that the ground which the prisoner would be obliged to traverse, in order to reach the point assumed, by

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(a) *The State v. McCann*, 18 Smedes & Marshall, 476, 478.

(b) It would depend, also, upon the season of the movement, as whether it were by day or by night, and the state of the weather at the time.

the nearest course, abounded in natural obstacles of the most serious kind; such as a low growth of pine trees, thick under-brush, briars, and the like. (a) It appeared, however, that a person acquainted with the localities might avoid these impediments, by taking advantage of paths leading through or around them; and that, by adopting this course, it would take no longer to reach the point assumed, by going through the woods, than by going by the road itself. (b) It was further shown that the accused was a hunter and woodsman, that he had always been in the habit of shooting about his plantation a great deal, and very much accustomed to travelling in the woods with a gun. (c) And it further appeared from the evidence, that the deceased, in passing along the road, just before the murder, travelled at a moderate pace, stopping from time to time, to converse with persons whom he saw near the road-side. (d)

Whether it were possible for a party against whom suspicious or criminative circumstances are shown, to have been present at the scene of the crime, or in its immediate vicinity, at the time of its commission, is not always left to be *inferred* from the facts themselves. Very often, the defence is distinctly set up that he was actually *elsewhere* at the time, and so, could not possibly have been present. This peculiar defence will be more fully considered hereafter, under the head of exculpatory circumstances and considerations.

The great characteristic of the class of circumstances now under consideration,—those, namely, which accompany the commission of crime,—is the peculiar *secrecy* with which

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(a) *The State v. Carawan*, Superior Court of Law, Beaufort County, North Carolina, Fall Term, 1858 Pamphlet Report, 87, 41.

(b) *Id.* 44, 45, 46, 50.

(c) *Id.* 48, 44.

(d) *Id.* 44, 51.



they are invested, and which constantly operates to impair, in a material degree, their otherwise conclusively probative effect. Secrecy is, indeed, the peculiar characteristic of criminal action in all its stages, including those of preparation and subsequent conduct. But it is while engaged in the actual perpetration, or advancing towards it, that the necessity of unusual precaution is experienced, and it is at this stage that the most strenuous efforts are made to exclude all human observation ; and the contrivances for this purpose are often arranged with consummate art. Hence it so often happens that the deadly assault itself, and its effects upon the victim are seen only in the *physical signs* of them which are discovered *afterwards*. Some of these, it is true, escape to the world and are perceived, almost at the very moment of their production, by other senses than that of sight. A shriek or a groan, which violence itself may have failed to suppress, or the sound of a heavy fall or mortal struggle in an adjoining room, serve to betray the murderer in the midst of his bloody work ; (a) and the utterance of his very name by the victim, in his extremity, is sometimes found to furnish decisive evidence of identity. (b) But the great mass of these physical circumstances, which are often of the highest importance, as indicative of guilt, though originating at this stage, do not become the subjects of observation and evidence until subsequently. As the most material of these have already been mentioned with some minuteness, in a previous part of this work, further reference to them will be unnecessary.

The contrivances usually resorted to, for the purpose of concealing the fact of presence, which is felt by the criminal to be so dangerous and decisive against him, are, in addition to rapidity or stealthiness of movement, the taking advan-

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(a) See the trial of Captain Goodere and *M. Mahony*, 17 State Trials, 1040, 1044, 1047, 1050. Trial of *Charles White*, *Id.* 1082, 1084.

(b) *The People v. Beehan*, Suffolk (N. Y.) Oyer & Terminer, October, 1854.

tage of opportunities afforded by the absence of any observers, or by the obscurity of night; the employment of disguises of the person; and the more desperate expedient of getting rid of observation by the perpetration of an additional crime. But there are some crimes of peculiar atrocity, in which the perpetrator contrives to separate his person wholly from the injurious act, by selecting or contriving some implement of destruction, which shall do its work without his immediate agency; or, by a refinement of malice, shall derive its active energy against the intended victim, from his own unconscious act; as where an explosive machine is conveyed to the party's premises, (*a*) or a letter containing fulminating powder is transmitted to him; (*b*) or where poison is insidiously conveyed into some tempting or apparently innoxious article of food or drink, and placed in his way; or where a person whose life is sought, is decoyed or ignorantly led into a snare set for him, under circumstances suggesting the supposition of accident as the most probable cause of death.

There is one offence, however, in which, though of the greatest enormity, this avoidance of human observation by the actual seclusion of the perpetrator himself, during the criminal act, is not always practised; reliance being placed on the subtle character and inherent activity of the destructive agent employed,—namely, murder by *poisoning*, especially in those cases where some relation exists between the parties, which brings them intimately and permanently together. (*c*) The circumstances of most hazard, in these cases, occur in the preliminary stage of preparation. The procurement of the poison, and its actual introduction into

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(*a*) *The State v. Arrison*, Cincinnati Crim. Court, Dec. 1854. See also *R. v. Mountford*, 1 Moody's C. C. 441.

(*b*) *Rex v. Palayo*, Wills, Circ. Evid. 99.

(*c*) See further as to these relations, *post* in this section.

the particular vehicle selected, are usually carried on in secret, or under some disguise. (a)\*. After these objects are secured, observation is no longer shunned, but rather sought as a means of avoiding suspicion. Hence it may happen that the whole murderous process of extinguishing life may be actually carried on before witnesses; the murderer relying on the false impressions which the circumstances observed are so apt to convey, or upon his own statements and explanations in relation to them, and sometimes on the absolute unimpressiveness of the circumstances themselves. The actual assault upon the person, involved in the administration of the poison, appears under the form, either of an indifferent act, or an office of courtesy or affection, or even a praiseworthy act of sympathizing attendance upon suffering. (b) The effects, as shown by the symptoms and distress of the victim, are, in many instances, securely attributed to the natural causes of illness or infirmity. (c) The exclusion of medical aid for a period long enough to ensure a fatal result, is effected under the common pretext of its being unnecessary. (d) And, finally, the exclusion of the friendly visits of those who would be inclined to look upon all these circumstances with suspicious eyes; and be hence enabled to detect the crime, at least in the last stages of its consummation; is effected on the ground of peculiar regard for the repose of the sick, and a desire to relieve from needless though well-meant annoyance. (e)

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(a) But in the case of *Rex v. Burdock*, the prisoner put the poison into the gruel of the deceased before the witness' eyes, telling her, however, that it was done in order to ease the deceased from pain. Best on Pres. § 196.

(b) *Rex v. Burdock*, *ubi supra*. *The People v. Henrietta Robinson*, Rensselaer Oyer & Terminer, May, 1854. 1 Parker's Crim. Reports, 649, 651.

(c) Case of *Gesche Margarethe Gottfried*, 4 Lond. Legal Observer, 89, 90. *The People v. Kesler*, 3 Wheeler's Crim. Cases, 19.

(d) Trial of *Katharine Nuirn* and *P. Ogilvie*, 19 State Trials, 1291. *The People v. Kesler*, 3 Wheeler's C. C. 20, 21. *Commonwealth v. Chapman*, Celebrated Trials, 840. (Phil. 1835.)

(e) Trial of *K. Nuirn* and *P. Ogilvie*, 19 State Trials, 1284.

As this species of murder constitutes, in some respects, a distinct class of crime, it may be well to devote a moment's attention to the principal circumstances which are found to accompany its perpetration, as they are illustrated by some of the most prominent cases on record.

A leading circumstance by which this offence is pre-eminently distinguished, is the period of *time* over which the criminal act, or rather action, is designedly suffered to extend itself. Where other destructive agencies are employed, the criminal's great object is to strike the blow by one single, *short* and sometimes momentary act, the danger of prolonging his personal presence at the scene of crime, being felt to be imminent. And, in some instances of poisoning, a similar rapidity of movement is practised; the substance made use of having power, (from its quality or quantity,) to kill almost as instantaneously as a thrust or shot in the heart or brain. (*a*) But the poisoner more commonly finds it his safest policy, to destroy by degrees, or by repeated administrations. In some instances, the foundations of life have been sapped by a process so slow as to be next to imperceptible; admitting of the assignment of almost any other agency, as its cause, than the true one. In the great case of the murderers of Sir *Thomas Overbury*, (*b*) the poisons selected were of the most subtle and insidious character that the science of the time could discover or contrive; (*c*) and the process was, in itself, so slow, that the murderers finally became alarmed lest their efforts should be foiled by the resisting powers of nature herself; and it was therefore brought to a speedy close by more active agencies, and even manual violence. In *Mary Blandy's* case (*d*) also, the de-

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(*a*) Prussic acid was employed in the case of *Regina v. Tawell*, (Wills, Circ. Evid. 198;) laurel water, in the case of *Rex v. Donellan*, Garney's Report, 1781.

(*b*) 2 Howell's State Trials, 911—1022.

(*c*) *Id.* 941, 947.

(*d*) 18 *Id.* 1154, 1155, 1160.

ceased appears to have been subjected to a course of poisoning, under the effect of which he lingered until hurried out of existence by doses of increased potency.

The great characteristics of this crime, are the coolness and deliberation with which it is usually perpetrated; and the art,—sometimes amounting to positive skill—with which the means employed are adapted to the end in view. Sometimes, indeed, the force of the revengeful motive is so urgent as to blind the actor to all prudential considerations; and in his eagerness to destroy the single life aimed at, he needlessly involves the lives of many others: as where a whole family is poisoned by food prepared for the destruction of a single obnoxious member. But, in the majority of cases, the criminal proceeds warily, with a careful eye to his own safety; proportioning and adapting his conduct to circumstances; calculating consequences in advance; awaiting their occurrence; watching their appearances as they present themselves; and accommodating his further action to the character of such appearances. Two leading objects are almost constantly kept in view. One is, to find or to place the intended subject of the crime under such circumstances, that the operation of the poison may be confined to him or her *alone*: the allowance of any wider range tending to increase the chances of alarm and detection. The peculiar situation which, more than any other, presents a combination of circumstances most favorable to the attainment of this object, is that which has already been adverted to, *-ill-health*. Such a condition offers peculiar facilities and opportunities for getting full possession of *both* the vehicles, by one or other of which, the poison must be administered,—food and medicine; while it furnishes obvious pretexts for injunctions (which might otherwise appear suspicious,) to other persons who may be in attendance, *not to partake of*, or even touch the food which has been prepared for the sick

person's use. (a) The condition of the sick, too, being one generally of dependence, and sometimes of utter helplessness, affords in itself many facilities for the consummation of the criminal purpose. And, in fine, the operation of the poison is so artfully assimilated to, and interwoven with the effects of disease or medicine, as to render it extremely difficult to distinguish the one from the other; and, in this way, even professional acuteness, when brought to bear upon the case, in *ante mortem* examinations, or in the expression of opinions upon such examinations by others, is sometimes effectually confounded and deceived.

Another object, diligently contemplated in this class of crimes, is, to place the poisoner in such a relation to the subject, as may bring the former into the closest, most constant, and if necessary, exclusive contact with the latter. In *Anna Schonleben's* case, (b) the situation of *nurse*, which the murderess contrived to obtain in three families successively, gave her all the opportunities she desired for practicing her nefarious arts with the most complete success; and she managed even to gain credit and reputation from the seeming assiduity with which she discharged her duties, while actually poisoning two persons. In the second of these cases, she had administered all the medicines with her own hand. (c) In the case of the poisoners of Sir *Thomas Overbury*, already referred to, a leading object, from the beginning, was to get exclusive control of the victim's per-

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(a) See *Rex v. Burdock*, Best on Pres. § 196. In *Mary Blandy's* case the prisoner, about six weeks before her father's death, cautioned one of the servants against eating any of her father's water-gruel, "for," said she, "I am told, water-gruel hurts me, and it may hurt you." And yet, afterwards, and about a week before his death, she told the same person, that she had been in the pantry, stirring her father's water-gruel, and eating the oat-meal out of the bottom of it. 18 State Trials, 1145, 1146. The last statement was undoubtedly false, as the pretended oat-meal was arsenic.

(b) 8 London Legal Observer, 41.

(c) *Id.* 42.

son. How this was effected, has been described under a previous head.

But it is the relations of domestic life which appear to afford opportunities the most favorable to the attainment of the object last mentioned, as well as to the accomplishment of the criminal purpose, in general. In these, the murderer gains a great preliminary advantage, in disarming what is always his greatest enemy, and the intended victim's best defence,—*suspicion*; while the parties are brought into precisely the kind of contact desired. Hence we find these relations constantly made use of, to consummate the most atrocious purposes, by those in whom the impulses of affection have either been entirely extinguished, or turned into positive hatred, or made subservient to the sordid appetite for gain. Parents have been poisoned by their children, (*a*) and children by their parents. (*b*) But, of all the relations just mentioned, that which seems to afford the widest range of unlawful motive, on the one hand, and of opportunity for gratification on the other, is the relation of *husband and wife*. Hence, in a large proportion of the worst cases of poisoning on record, the perpetrator and the subject of the crime are found to have stood in this relation. (*c*)

A brief notice of a few of these cases will serve to throw at least a partial light upon some of the most important circumstances by which the perpetration of this atrocious crime

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(*a*) *Mary Blandy's case*, 18 State Trials, 1117. See also the case of *Adeline Phelps*, before the Supreme Court of Massachusetts, December, 1853, in which, however, the prisoner was acquitted on the ground of insanity. Law Reporter, May, 1854. See also the trial of the *Lalouettes*, in the department of Yonne, in France, March, 1854, appended to the report of the foregoing. Law Reporter, p. 25.

(*b*) *G. M. Gottfried's case*, 4 London Legal Observer, 89.

(*c*) Case of *Nairn and Ogilvie*, 19 State Trials, 1235. *Gottfried's case*, *ubi supra*. *The People v. Kesler*, 8 Wheeler's Crim. Cases, 18. *The People v. Green*, Rensselaer Oyer & Terminer, July, 1845. *The People v. Hendrickson*, Albany Oyer & Terminer, July, 1858. *The People v. Williams*, New York Oyer & Terminer, May, 1854.

has been found to be accompanied. In the Scotch case of *Nairn and Ogilvie*, (a) where the wife had openly transferred her affections to another, and the husband was found to be an incumbrance, no great secret appears to have been made of the criminal purpose entertained; and yet, after the crime was finally determined on, much caution and reserve were practiced in its actual perpetration. Great art and secrecy were observed in obtaining the poison; secrecy was observed during the material act of mixture; some skill was shown in rendering the vehicle efficacious; and advantage was taken throughout, of the impaired health of the husband, to account for, or to aid in accounting for symptoms which otherwise might have excited suspicion. In the German case of *Gottfried*, (b) also, the ill health of the husband was a paramount inducement and aid to the criminal action determined on, although more reluctance was shown in the actual perpetration.

In the New York case of *The People v. Kesler*, (c) the wife had become suddenly unwell, while in the husband's company at a public house; and the husband thereupon assumed the exclusive administration to her of such medicines, (or substances represented to be medicines,) as he thought proper; declining, to a great extent, the proffered aid and attendance of others; and, though urged to send for a physician, delaying to do so until the case was hopeless. In this instance, the wife had been subject to hysterics and fits; and all the symptoms consequent upon the administration of the poison, and which had attracted the notice of persons in attendance, were confidently attributed by the husband to this cause.

In the later case of *The People v. Green*, (d) where arsenic was satisfactorily detected in the body of the de-

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(a) 19 State Trials, 1285.

(b) 4 London Legal Observer, 89.

(c) 8 Wheeler's Criminal Cases, 18.

(d) Rensselaer Oyer & Terminer, July, 1845.



ceased, and, in substances of which she had partaken, the husband proceeded more boldly. The wife having become suddenly and violently sick, after taking some medicine from his hands, no objection was made to the calling in of physicians, or to their prescribing in the case. But the prescriptions were little regarded by the husband, who took upon himself to administer certain *white powders*, and continued to administer them during her whole illness; mixing them not only in the medicines left by the physician, but in various articles of food, and sometimes in drinks prepared entirely by himself. Attendance upon the sick was also freely permitted, but this proved to be no check upon the execution of the criminal purpose. On one occasion, indeed, the temporary absence of the attendant was taken advantage of; and on another, he was seen to turn his back to his wife, while dusting into her drink some powder from a paper he took from his pocket; but, for the most part, he made no secret of mixing the powder, and when observed and remonstrated with, for so doing, represented it to be either one of the medicines allowed, or some well-known harmless article of a similar appearance, such as cream of tartar, soda, and even flour. Some of these substances had actually been kept in the sick room, others were kept in the house; and under this convenient disguise of a *similar appearance*, the administration of the poison was securely accomplished. (a)

In the more recent case of *The People v. Williams*, (b) which resembled the foregoing in several of its circumstances, advantage was taken by the husband, of the temporary

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(a) White substances, resembling arsenic in outward appearance, but constantly used as food, such as salt and sugar, have frequently been employed to disguise that poison. In *Anna Schonleben's* case, arsenic had been conveyed into the salt-box, and salt-barrel. 3 London Legal Observer, 42. In the late case of *The People v. Henrietta Robinson*, white powdered sugar was used as the vehicle. Rensselaer Oyer & Terminer, May, 1854. See 1 Parker's Crim. Reports, 651.

(b) New York Oyer & Terminer, May, 1854. In this case, a new trial was granted.

absence of the attendant, to meddle with an article of food which she had provided, and of which he soon after prevailed upon his wife to partake, to the last spoonful, notwithstanding her reluctance, and her objection to its peculiar taste. (*a*)

Among circumstances observed to have been attendant on the crime of poisoning, may be mentioned the following:—taking food, drink, or medicine into another or private room or closet, before administering it to the invalid; (*b*) giving false names to substances observed to be mixed with such articles, (*c*) and giving false reasons for mixing them; (*d*) washing the hands with unusual care after such act, and cautioning an observer not to tell the sick person what had been done; (*e*) and indifference or heartlessness of manner and conduct, while the sick person is in the agonies of death. (*f*)

In the crime of *arson*, which next occurs for consideration, great pains are usually taken by the criminal to avoid subjecting to observation the important fact of his presence at or near the scene of the crime, about the time of its commission; and there exist peculiar inducements to such a course of conduct. It is a well-known characteristic of this offence, that the slightest appearance indicative of its perpetration soon attracts public attention to the spot, and if

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(*a*) For other cases of wife-murder, by similar means, see *The People v. Grunzig*, New York Oyer & Terminer, November, 1851. 1 Parker's Crim. Reports, 299. *The People v. Hendrickson*, Albany Oyer & Terminer, July, 1858.

(*b*) Case of *Nairn and Ogilvie*, 19 State Trials, 1287, 1807. *Rex v. Burdock*, Best on Pres. § 196. *Commonwealth v. Chapman*, Celebrated Trials 335. (Phil. 1835.)

(*c*) *The People v. Green*, Rensselaer Oyer & Terminer, July, 1845. Pamphlet Report, 21, 25.

(*d*) *Rex v. Burdock*, *ubi supra*.

(*e*) *Id. ibid.*

(*f*) *Id. ibid.*

the perpetrator be found there or in its immediate vicinity, the danger of detection is proportionately great. There being no such thing as concealment of the *subject* of the crime, (like hiding the body of a slain person,) where it has been successfully operated on, the only alternative left the perpetrator, is to conceal *himself*. Facilities for doing this are afforded by the intrinsic nature of the crime, which, so far as amount of human agency is concerned, ordinarily consists almost entirely in *preparation*. Hours are often spent in arranging the combustible materials, and connecting them with inflammable substances; but the application of the fire is strictly momentary, and before it is made effectual in any outward appearance, the criminal may contrive to separate his person from the scene of the offence, by an interval of time or space long enough to confound or frustrate all inquiry.

It sometimes happens that a person meditating arson is discovered at the scene of the crime, in the midst of his preparations, and these so complete, as seemingly to await only the application of the flame. (a) But, more commonly, the most proximate circumstances indicative of criminal action, which it is possible to present, are those of the incendiary's entry upon and exit from the premises fired; and here, the same two concomitant circumstances occur for consideration which were noticed as qualities of action, under a previous head; namely, *stealthiness* and *hastiness* of movement. In approaching and entering the premises, the incendiary's movements are usually indirect and comparatively slow. A season of darkness is often selected, and under its cover he lurks noiselessly around the spot, awaiting the opportunity to enter unobserved. But, in leaving the

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(a) See the case of *The People v Peverelly*, ante, p. 351. The great peculiarity of this crime, namely, its adaptation to the destruction of the evidence of its commission, (a leading object of criminal agency,) has been remarked upon. Alison's Principles of the Crim. Law of Scotland, 444. Roscoe's Crim. Evid. 276.

premises, after applying the flame, his movements are more apt to be rapid and even hurried. The paramount thought now is, to escape before the fire breaks out to view. Apprehensions are doubtless often felt that this breaking out may be sooner than has been provided for; and, under the influence of these ideas, the criminal's movements sometimes become accelerated into the most precipitate flight. In the case of *James Hill*, who was tried at Winchester, in 1777, for setting fire to the rope-house in the Royal Dock-yard at Portsmouth, (a) the prisoner was seen, shortly before the fire broke out, hurrying in a direction from the spot, getting into a cart to expedite his movements, urging the driver to increased speed, by the offer of money; and finally, when the vehicle stopped, jumping out of it and running away.

In cases of arson by the occupants of the premises fired, the concomitant circumstances assume a different shape. The acts of entry and exit excite little or no attention, unless they occur at very unusual hours. Actual presence on the premises is, of course, nothing but what is looked for; and this sometimes affords opportunity for preparations of the most elaborate kind. In such cases, however, the secrecy and seclusion necessary for carrying them on, in connection with the time spent in the process, are circumstances often of a criminative tendency; and the fact of the occupant being seen to leave the building clandestinely, or without giving any alarm, just before the fire breaks out, always and naturally gives rise to inferences unfavorable to innocence.

In burglary and robbery, it is always an important circumstance that the accused was seen lurking or loitering about the premises, or coming out of them at unseasonable hours or where they have been known to be locked up. In larceny, the same facts are material. The most proximate circumstance, indicative of this crime, short of direct evi-

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(a) 20 Howell's State Trials, 1817, 1844.

dence of its perpetration, is where the accused has been seen with the article in his hand, which is afterwards missed, and found in his possession. The physical evidence afforded by foot-prints, and correspondences between objects found at the scene of the crime, and others found in the possession of the accused, is always important to show the fact of presence, in all the offences just mentioned.

In charges of passing counterfeit money, a strong concomitant circumstance against the accused is his paying away the bill in question without calling for the change due on the purchase. (*a*) Other circumstances of the same character are,—passing a comparatively large bill for a small quantity of liquor not drunk, and immediately leaving the store; returning, a short time after, with a similar bill, attempting the same practice, and, on being charged, fleeing into the woods, and not accounting for the possession of the bills; (*b*) or when asked for his name and place of residence, giving a false name and address. (*c*)

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(*a*) *Rhodes' case*, 1 City Hall Recorder, 1, 2.

(*b*) *Helm's case*, *Id.* 46, 47.

(*c*) *Whiley's case*. 2 Leach, 988. 1 New Rep. 92, S. C. Roscoe's Crim. Evid. 90.

## SECTION XIV.

*Subsequent Circumstances.*

The next division of that class of criminative facts or circumstances to which the distinctive appellation of *moral* has been given, comprises those which *follow* the perpetration of the offence. These constitute a more numerous division than either of those which have been designated as *precedent* or *concomitant*; comprehending the very important facts of the destruction, suppression and eloignement (*a*) of evidence of the act,—the fabrication of evidence, in order to avert suspicion,—possession of articles of criminative evidence, including the fruits of crime, and the subject of the crime itself,—and conduct and language before and on arrest, and afterwards, including the leading circumstances of flight, demeanor, and denials or admissions of guilt. Interwoven with these, and necessarily dependent upon them, is the large class of *physical* facts which are, now, for the first time, brought to light; being either casually presented to the notice of observers, or discovered upon express search for the purpose.

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(*a*) *Eloignement* is the getting a thing or person out of the way, or removing it to a distance, so as to be out of reach; (from Fr. *eloigner*, L. Lat. *elongare*, to remove to a distance, *longum iter*.) It was formerly a common return to writs of replevin, and writs *de homine replegiando*, that the goods or person named in the writ had been *eloigned*. 3 Bl. Com. 129, 148. F. N. B. 68, 69, 74. Mr. *Bentham* has observed that the words *eloign* and *eloignement* are wanted, in current or ordinary language. 3 Jud. Evid. 166, note.

## SECTION XV.

*Destruction, Suppression, and Eloignement of Evidence.*

It is apparent, from the confessions of criminals, as well as other evidence in numerous recorded cases, that the first consideration which ordinarily occurs to the mind of a person who has perpetrated a crime, is to *conceal* the fact, or to prevent its discovery. This seems to be so far a natural impulse, that, (in cases of homicide, in particular,) it may occasionally be yielded to, by those who are not actually guilty, to the extent imputed, involving them in conduct of a character most fatal to themselves. Cases of this kind, however, are of rare occurrence; for, doubtless, it is the nature of guilt and not of innocence, to seek concealment. Occasionally, a murderer, elated with a sort of fiendish satisfaction, will voluntarily discover or avow his act, and glory in it. But these are exceptions to the general and ordinary course of criminal conduct. The assassin, no less than the burglar, robber, ravisher, forger or thief, instinctively avoids every thing which may, even indirectly, lead to his detection and punishment. (a)

Among the most common expedients resorted to for the purpose of hiding a crime, are,—the destruction or concealment of the subject of the crime itself; such as the concealment of a dead body, by interment, or otherwise; the removal of it to a distant spot, without burial; the mutilation or destruction of it, where concealment of the entire body is impracticable; concealment or destruction of the clothing of the body, or other articles upon it, by which the crime might be traced out;—concealment or destruction of the instrument of the crime;—removal of the physical marks and traces of the crime;—concealment of the scene

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(a) See further, on this subject, *post*, Section XXII.

of the crime, and of the criminal himself, while engaged in such work of concealment or destruction ;—destruction of the scene, the subject and the evidence of the crime, by one single act of arson ;—concealment of the fruits of the crime ;—getting witnesses out of the way, and the like.

The bodies of murdered persons are frequently concealed by the natural method of *interment*. Where death has been accomplished by poison, and the impression has been effectually made that it is merely the result of natural illness, the process of interment is left to take its ordinary course ; although there is always more or less anxiety that it should take place without delay, as it obviously diminishes the chances of any further examination of the body. Sometimes, the criminal is betrayed by this feeling into an undue and manifest haste, which is always a suspicious circumstance, especially if the interment be made studiously private. (a) In the case of *Rex v. Donnall*, (b) Mr. Justice *Abbott* told the jury that the conduct of the prisoner,—his eagerness in causing the body to be put into a shell, and afterwards to be speedily interred, and put out of sight,—was a circumstance most material for their consideration.

Where interment has thus taken place, in the natural way, under false impressions of the cause of the death, it is, of course, for the interest of the criminal, that the body should be left to decay as quickly as possible, as an effectual means

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(a) See the case of the murderers of Sir *Thomas Overbury*, 2 State Trials, 918. In the case of *Rex v. Burdock*, where the deceased died, with symptoms of poisoning, in about two hours after taking some gruel from the prisoner, no medical assistance was procured, nor were her relations made acquainted with her death by the prisoner, who caused her to be privately buried; telling the undertaker that an old lady had died in her house, who had no friends, and that she (the prisoner) must bury her; as the things belonging to her were worth little or nothing. Best on Pres. § 196. See also *Hitzig*, *Neue Pitaval*, referred to in *Wharton's Am. Crim. Law*, 338, (ed. 1855.)

(b) *Frazer's Report*, 170. *Wills, Circ. Evid.* 76, 188.



of destroying any evidence which it might otherwise, on examination, afford against him. Hence, in cases where, from any suspicious circumstances, disinterment has been determined on, with a view to medical examination, various expedients have been adopted, to delay or retard the process or to render it otherwise ineffectual. The celebrated English case of *Rex v. Donellan* presents some instructive facts on this point. In that case, the guardian of the deceased had written to the accused, who was his brother-in-law, directing him to have the body (which had not then been interred) immediately opened by competent physicians, assigning as a reason, that *poison* had been suspected as the cause of the death. Having received an assenting answer, a second letter was written to the accused, in more general terms. When the physicians came to open the body, this second letter was shown to them, but *the first was entirely suppressed*. On seeing the state of the body, and inquiring of the accused, for what purpose it was to be opened, and learning from him that it was only “for the satisfaction of the family,” and no intimation of any suspicion of poison being made by him, or appearing from the letter shown, the physicians concluded that, at so late a period, it would be of no use, and they therefore *omitted* it altogether. The body was then interred, and a letter written by the accused to the guardian of the deceased, giving him to understand that the opening had taken place. As soon as the latter found that this was not the fact, he sent peremptory directions to have it effected immediately. The body was then disinterred, and finally opened and examined; but, by this time, decomposition had advanced so far that the operation was performed under all the disadvantages which might have been foreseen, and which probably were actually counted upon, as means of thwarting it entirely. (a)

In other cases of murder, where no advantage is possible

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(a) Gurney's Report, 1781. Celebrated Trials, (Phil. 1835,) 181, 182, 189, 150, 152. In the strictures on the proceedings in this case, contained in “The

to be taken of any such false impressions of the cause of death as have been described, the concealment of the body by interment is necessarily left to be accomplished by the criminal's own hands; and this is done, of course, with every possible circumstance of secrecy. In thinly peopled districts, remote and solitary spots and late hours of the night are selected for this purpose; and, where time permits, the work is done with great care and deliberation, so that no trace of the act shall be visible even to a practiced eye searching expressly for it. In a late appalling case which occurred in North Carolina, the spot selected was a low, open place, in an almost impenetrable thicket of small pines and tangled underwood, bushes and briars; the ground being covered with an elastic moss, which would take no impression from the feet. This moss was first carefully removed, and a shallow hole dug just large enough to hold the body. The body was then pressed in, the grave filled up even with the surrounding earth, and pressed down, and the moss carefully laid back upon it; and finally, the earth which had been dug out, carried laboriously away to some distance. This was done with such extreme care, and such pains were taken to avoid leaving any traces, such as broken or displaced bushes, which might indicate a passage through the surrounding thicket, that the spot came near being entirely overlooked, although a diligent search was purposely made for it, by persons acquainted with the locality and its usual appearances; and, but for a few small and peculiarly shaped lumps of earth, and two disturbed laurel poles which caught the eye of the searchers, just as they were about leaving it, would not have been discovered. (a)

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Theory of Presumptive Proof," great stress is laid on the fact that no adequate traces of poison were found in the body; but no sort of notice is taken of the facts proved against the accused, and summarily stated in the text, going to show contrivance on his part to bring about this very result. Theory of Pres. Proof, 81, *et seq.*

(a) *The State v. Carawan*, Superior Court of Law, Beaufort County, N. Carolina, Fall Term, 1858. Pamphlet Report, 84, 85. It was further shown

In other cases, as where there is danger of immediate or speedy discovery, or where the criminal becomes alarmed while at his work, the interment is hastily and imperfectly effected. (a) Sometimes, all burial is dispensed with, and the body flung into a pit, well, (b), pond (c) or stream, with or without precautions to hide it from view, according to circumstances.

Where a murder has been committed on the premises of the criminal himself, the reasons for concealment are peculiarly urgent, while the difficulties of effecting it are proportionately great. The murderer cannot, as in other cases, leave the body and escape, for such an act would afford evidence of the strongest kind against him. To retain it unburied, would necessarily lead to speedy detection. It must be put out of sight; and, as the danger attending the carrying it away, for the purpose of concealment, would be great, there is no alternative but to conceal it *on the premises*. Sometimes, circumstances favor the accomplishment of the object, by burial of the entire body. In the New Jersey case of *The State v. Robinson*, (d) the prisoner had killed his creditor in his own house; but it happened that no other person was at the time in the building, the building itself was unfinished, and, it being a season of public religious service, (e) the premises could be closed without exciting suspicion. Advantage was taken of these circum-

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in this case, that, two days after the deceased disappeared, the prisoner was seen going from his house, with a hoe, towards the woods, it being a rainy day, and was absent some hours. *Id.* 51, 52.

(a) *John Adam's case*, 11 London Legal Observer, 415.

(b) *Mrs. Spooner's case*, 2 Chandler's Am. Crim. Trials, 8.

(c) *Rex v. Thurtell and Hunt*, Celebrated Trials, (Phil. 1885,) 5. In this case, the body was carried to a pond on the premises of one of the accomplices, and being put into a sack, with some stones, was sunk in the water. It was afterwards taken out and sunk in another pond at some distance, by similar means. *Id.* 7. 11, 12.

(d) Middlesex (N. J.) Oyer & Terminer, March, 1841.

(e) It was on Thanksgiving day, December 3d, 1840.

stances, to bury the murdered man, with considerable care, under the front basement floor of the house, where the body was soon after found. (a) In other cases, no such facilities exist. The body, in its entire state, cannot be hidden on the premises. This has sometimes led to the desperate and revolting expedient of *dismembering* it, for the purpose of more easy disposal, or with a view to the ultimate destruction of it by fire. In a late case in England, where a coachman was tried for the murder of a young woman who passed as his wife, the body had been mutilated, parts of it were found concealed in a stable, and attempts had been made to consume it by fire, the remains of a skull, and other bones being found among the ashes of a grate on the premises. (b) In another case, where a man murdered a creditor who came to ask him for his debt, the same expedient of burning was resorted to, but the criminal was betrayed by the odor arising from the process; (c) which circumstance also contributed to the discovery of the crime in the preceding case. In the late Massachusetts case of *Commonwealth v. Webster*, the body was dismembered, and, to some extent, destroyed by fire, and there were circumstances in the case which served to aid this mode of concealment. (d) But the continued fire which the accused was obliged to keep up, in order to accomplish the destruction intended, had the

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(a) See the case of *Rex v. Corder*, where the body was buried under the floor of a barn, and remained undiscovered for nearly a year. Celebrated Trials, 218, 222, 224, (Phil. 1835.)

(b) Case at Putney, Central Criminal Court, May, 1842; Wills, Circ. Evid. 166. In the case of *Rex v. Greenacre*, before the same court, April, 1837, the action of fire was not resorted to, but the dismembered portions were scattered about in various places, where they were found at different times;—the trunk in the Edgeware Road, the head in the Regent's Canal, and the legs in an osier-bed at Camberwell. Wills, Circ. Evid. 171.

(c) *Rex v. Cook*, Leicester Summer Assizes, 1834. Best on Pres. § 204, note.

(d) The prisoner's acquaintance with anatomy, the character of the premises, and the fact that an apartment in the same building was actually used as a dissecting room.

effect of heating the wall of the premises, to such a degree as to attract observation to the spot, to confirm other circumstances of suspicion, and finally, to induce a search ; and the peculiar character of the receptacles in which, upon investigation, the undestroyed remains were found, served at once to connect him with the crime in the most convincing manner.

Finally, there are cases where the nature of the premises on which the crime is committed, does not admit the possibility of concealing the body upon them, either in an entire or dismembered state, but the criminal is left to the single expedient of taking or sending it away. Where the crime has been committed in a closely-populated neighborhood, and especially in a city, the danger of exposure, attending such a removal, is palpable, and various contrivances have been resorted to, in order to avoid it. In the New York case of *The People v. Colt*, (a) the body of the slain man was forcibly crammed into a packing-box which happened to be in the room where the crime was committed, the box nailed up, directed to a person at St. Louis, to the care of a firm at New Orleans, put on a cart, and sent on board a vessel bound for the latter place ; a receipt being taken for it, in the usual form of shipped merchandize. In other cases, the body is removed from the premises under the cover of darkness. In the case of *The People v. Johnson*, (b) the murderer first made an attempt to hide the body in a hole in the cellar of his own house. But, finding this impracticable, he resorted to the desperate expedient of taking it out into the street, and leaving it on the pavement, where it was discovered the next morning, with the ropes by which it had been carried to the spot, still attached to it.

The *clothing* worn by the person slain presents another

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(a) New York Oyer & Terminer. January, 1842; Testimony of *Richard Barton*, — *Godfrey*, *J. P. Ellwell*, *W. S. Coffin*, and *A. Milliken*.

(b) 2 Wheeler's Criminal Cases, 372, 376, 381.

object, which the criminal finds it important or necessary to conceal, as well as the body itself. Where the body is buried with the clothing on it, the same act suffices for the concealment of both. (*a*) But such portions as have been removed are hidden by throwing into receptacles not likely to be examined, (*b*) or actually destroyed by fire. (*c*) In one case, the clothes and hat of the murdered person were disguised by dyeing them another color. (*d*) Articles taken from the pockets are thrown away or burnt, (*e*) unless of considerable value, in which case they are more commonly secreted for the criminal's benefit. (*f*)

The next object of concealment or destruction, as an evidence of crime, in cases of homicide, after that of the dead body and its clothing, is the *instrument* with which the crime was committed, bearing, as it frequently does, manifest marks of its fatal use. The bloody knife or dagger, hatchet or club, is sometimes hastily thrown into a temporary hiding-place, (*g*) sometimes carefully concealed at a distance from the scene; (*h*) and sometimes wholly or partly destroyed by fire, (*i*) or water. (*j*) The paper containing the remains of the poi-

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(*a*) *Rex v. Corder*, Celebrated Trials, 218, 222, (Phil. 1835.) *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841; Pamphlet Report, 8, 9, 11. *The State v. Carawan*, Beaufort (N. C.) Superior Court, Fall Term, 1858. Pamphlet Report, 34, 35. In the case of *Bishop, Williams and May*, only the clothing was buried, the body having been disposed of. 2 London Legal Observer, (Monthly) 46.

(*b*) *The People v. Johnson*, 2 Wheeler's Crim. Cases, 376. *The People v. Colt*, New York Oyer & Terminer, January, 1842.

(*c*) *Commonwealth v. Webster*, Bemis' Report, 566.

(*d*) *Drayne's case*, 4 Lond. Legal Observer, 124, 125.

(*e*) *Rex v. Thurtell and Hunt*, Celebrated Trials, 7. *The People v. Colt*, *ubi supra*. *Commonwealth v. Webster*, Bemis' Report, 566.

(*f*) *Id.* 568.

(*g*) *The People v. Graham*, New York Oyer & Terminer, October, 1854.

(*h*) *Rex v. Richardson*, *ante*, p. 247.

(*i*) *Commonwealth v. Webster*, Bemis' Report, 567, 568.

(*j*) *The People v. Johnson*, 2 Wheeler's Crim. Cases, 381.

son used, is thrown into the fire, from which it has sometimes been snatched, to serve as a most important element of evidence. (a) Phials containing the residue of a poisonous liquid are rinsed out, or thrown away. (b) The instruments employed by burglars and counterfeiters, it is hardly necessary to add, are always concealed with peculiar care.

The destruction of the evidence of a murder by acts like those just mentioned, is usually accomplished by the criminal or his associates, in secret, or with some degree of privacy. In some cases, however, it is done openly, but under various pretexts answering the same general end. The remains of a poisonous liquid, for instance, are got rid of, under the pretence of being a nauseous mixture, offensive to the sense, and therefore requiring removal. *Donellan's* case may here be again referred to, for some very instructive facts. The deceased had become suddenly and violently ill, after taking a harmless draught prescribed by a physician, for a trifling ailment, and in a few minutes died. There being great reason to suspect poison, it was of course, of the utmost importance to any satisfactory conclusion on this point, that the remains of the draught and the phial or phials containing it, should be preserved undisturbed, until an examination of them could be made by competent persons. This was effectually prevented by the obtrusive and determined conduct of the prisoner, as the following statement may illustrate. On coming into the room where the deceased lay, and being told what had happened, he inquired for the physic-bottle; and on its being pointed out to him by the mother of the deceased, he poured some water out of the water-bottle, which was near, into the phial, shook it and then emptied it into some dirty water, which was in a wash-hand basin. Upon this, the mother of the deceased re-

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(a) *Rex v. Blandy*, 18 State Trials, 1149, 1154. *The People v. Sellick*, 1 Wheeler's Crim. Cases, 269.

(b) See *Donellan's* case, referred to, *infra*.

marked, "you should not meddle with the bottle;" upon which the prisoner snatched up another bottle which stood near, poured water into that also, shook it, and then put his finger to it and tasted it. The mother of the deceased again asked, what he was about, and said he ought not to meddle with the bottles; on which he replied that he did it to taste it, though he had not tasted the first bottle. Not content with this degree of interference, the prisoner next ordered the servant to *take away* the basin and the bottles, and put the bottles into her hands for that purpose. She put them down again, on being directed by the mother of the deceased, to do so; but subsequently removed them, on the *peremptory order* of the prisoner. Here was grossly obtrusive conduct, persisted in, in spite of repeated remonstrances; and its effect was to remove every vestige of any poisonous ingredient which the phials might have contained. (*a*)

In another case of supposed poisoning, there was a still more unwarrantable, though less open intermeddling, on the part of the accused, with the evidences of the fact; a process of medical examination having been actually entered on. The contents of the stomach of the deceased had been removed and placed in a jug, for examination. These were clandestinely thrown by the prisoner into a vessel containing a large quantity of water. (*b*)

But supposing, in a case of murder, the body of the slain

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(*a*) *Rex v. Donellan*, Gurney's Report, 1781. Celebrated Trials, 123, 124, 125, (Phil. 1835.) Notwithstanding the criticism which has been bestowed on the course and result of the trial in this celebrated case, the case itself abounds, perhaps more than any similar one on record, in circumstances of a criminative aspect, bearing in one direction, and from which, taken in connection, it seems impossible to draw any other reasonable conclusion than that of guilt. See 3 Benth. Jud. Evid. 65, 282. Wills, Circ. Evid. 196. Best on Pres. § 208.

(*b*) *Rex v. Donna'l*, Launceston Spring Assizes, 1817; Frazer's Report, p. 171. Wills, Circ. Evid. 74.



and the instrument of death effectually hidden from view, the attention of the criminal is usually next occupied with removing or concealing any *traces* or indications of the crime, which may become the subjects of observation; and his expedients for this purpose come next to be considered. These traces consist of a variety of visible objects and appearances; such as blood on the ground where the deceased has fallen; blood on the floor, walls, windows, or doors of the apartment where he was slain; blood on the instrument of death, (where it has not been destroyed;) blood on the clothes and person of the slayer; articles of clothing belonging to the latter, by which he may be traced and identified; and other articles more remotely connected with the commission of the crime.

In the case of *Thurtell* and *Hunt*, (*a*) the blood which had flowed from the body on the ground, was attempted to be covered with branches and leaves. In *Carawan's* case, it was said that the murderer scraped it up with his hands from the road, and, casting it into a ditch, threw some pieces of juniper wood upon it. (*b*) In *Riembauer's* case, (*c*) where the crime was committed in a house, stains of blood on a floor, which had become dry, were removed by planing them out, and throwing the chips into a stove. In *Robinson's* case, (*d*) the stains were concealed, partly, by planing

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(*a*) Celebrated Trials, (Phil. 1835,) 7.

(*b*) This was according to the statement of the prisoner's slave, whom his master compelled to assist him in burying the body. The statement, however, was not admitted in evidence. Pamphlet Report, 118.

(*c*) 3 Lond. Legal Observer, 242, 243.

(*d*) *The State v. Peter Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841; Pamphlet Report, 9, 11. The casing of the back room door had been planed down to from four to six inches from the floor, and the part not planed, painted over with yellow paint. That this planing had been done *after* the casings were put up, appeared from the fact that the shavings were broken off ragged, at the point where the motion of the plane was stopped by the floor. A part of the floor of the back room, near the door, and covering about three feet square, together with the floor of the entire entry from one end to the

out, and partly by painting over. In *Coll's* case, (a) where there was great effusion of blood upon the floor, the prisoner spent several hours of the night in soaking it up with cloths, and in washing the floor.

Spots of blood on the instrument used, where it has not been destroyed or thrown away, are, sometimes disguised by covering with another substance. In *Colt's* case, the handle of a hatchet was inked over for this purpose. (b)

(c) Stains of blood on the person of the criminal are, of course, removed by washing. (c) Stains on the dress are removed by washing, (d) rubbing, scraping, (e) or even cutting out, and other means. Where these methods cannot be adopted, or where they fail, or the effusion is large, the clothing itself is removed and hidden, (f) and sometimes destroyed by fire. (g)

Articles of clothing, worn by the criminal, about the time of the commission of the offence, and which might serve to identify him, are carefully concealed from view. It was

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other, the stairs leading down to the basement under which the body was found, and the wall at the side, were painted the same yellow color. That this had been done to *conceal something*, appeared from the fact that, on the painted portion of the floor of the back room, there were dark spots that still showed through the paint. And when the door-casing was taken off, it showed where a *red fluid* had run under it, and soaked or drawn up into the wood. This red stain was spoken of, by two of the witnesses on the trial, as *blood*, as also were several dried red spots on the wall near the back room door, and about a foot from the floor. But, by a strange oversight, instead of having these spots subjected to proper examination and analysis, the witness was allowed to rub them off himself, and the door-casing was thrown into a wood-house, where it was afterwards destroyed. Pamphlet Report, 9, 11. See what is said on this subject, *ante*, p. 140.

(a) *The People v. Colt*, New York Oyer & Terminer, January, 1842.

(b) *Id.* Testimony of Dr. Chilton.

(c) *Commonwealth v. Spring*, Philadelphia Criminal Court, March, 1853.

(d) *Rex v. Smith, Varnham, and Timms*; Wills, Circ. Evid. 240.

(e) *Rex v. Beards*; Wills, Circ. Evid. 102.

(f) *Rex v. Richardson*, *ante*, p. 245.

(g) *Mrs. Spooner's case*, 2 Chandler's Am. Crim. Trials, 22.

considered an important circumstance in the case of *Rex v. Howe*, (*a*) that a fawn-skin waistcoat, corresponding with one worn by him, on the evening of the murder, near the scene of the crime, was found in a box of articles belonging to him, which had been clandestinely removed, under a feigned name, and secreted in another place.

Lastly, articles which may serve to throw light on the character of the means employed to perpetrate the offence, become the subjects of endeavours at concealment by the criminal. It was a circumstance relied on in *Donellan's* case, (*b*) that a still, which had been used by the prisoner, before the death of the deceased, for distilling roses, was, shortly after that event, filled by him with wet lime, (which he said he used to kill fleas,) and directed to be cleaned; and, when cleaned, was further directed to be put into an oven, to dry. On the supposition that the still had been used for distilling laurel-water, which, it was claimed, had been administered to the deceased, here were very effectual precautions for obliterating every vestige of a criminal use, which might otherwise have been discoverable by the senses.

A necessary incident to most of the processes of concealment or destruction which have been mentioned, is the concealment of the *person* of the criminal himself, while engaged about them; and this is sometimes effected by means which, while they ensure the desired secrecy, at the moment, often serve to attract the very observation they are intended to shut out, and ultimately rank among the most important criminative circumstances of the case. Where a homicide is committed on the premises of the slayer, the first precaution is to secure the doors, so as to prevent all entrance from without; and where the processes of concealment, destruction or obliteration, deemed necessary, occupy a great

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(*a*) Wills, Circ. Evid. 285.

(*b*) Celebrated Trials, 129, 147, 148. (Phil. 1835.)

length of time, the premises are sometimes kept closed so long as to attract attention, and lead to persevering efforts to ascertain the cause. This is particularly the case where the locking up of the premises is an unusual circumstance, and where its effect is to shut out a particular person who has been in the daily habit of entering the apartments, for the performance of certain duties. In the case of *Moses Drayne*, (a) the door of the room where the murdered guest had lodged, was kept locked for eight or nine weeks after his disappearance, and the house-servant was not permitted to enter it during all that time. In *Peter Robinson's* case, (b) the premises occupied by the prisoner were found to be closed for some time on the morning of the disappearance of the deceased, so that his own brother was unable to enter. In *Colt's* case, (c) the door of the room from which very peculiar and alarming sounds were suddenly heard by the occupant of the adjoining room, was found to be closed, (d) immediately after, and it was kept closed for several hours; perfect stillness prevailing on the inside, and no notice being taken of repeated knockings on the door, by the person on the outside. In *Webster's* case, (e) the doors of the apartments in the Medical College occupied by the prisoner, and which the janitor was in the habit of entering freely with his own keys, were, on the afternoon of the disappearance of the deceased, suddenly made fast, by bolting on the inside; and they were kept in this unusual

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(a) 5 London Legal Observer, 128.

(b) *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841. Pamphlet Report, 17, 19. The closed appearance of the house, and particularly the circumstance that the side lights of the front door were boarded up, were observed and considered strange by a neighbor who was passing at the time. *Id.* 20.

(c) *The People v. Colt*, New York Oyer & Terminer, January, 1842; testimony of *A. H. Wheeler*.

(d) According to the prisoner's own confession, the door was locked, but the witness does not seem to have tried it, to ascertain the fact.

(e) *Commonwealth v. Webster*, Bemis' Report, 108—107, 109—118.

state for several days, the janitor being wholly excluded and prevented from the performance of his ordinary duties in them. It adds to the criminative aspect of facts like these, if the movements of a person are, at the same time, heard or seen within the locked apartment. This was the fact in both the cases last cited. (a)

Instead of the several expedients which have just been mentioned, and which involve a variety of acts and processes, (some of great labor,) performed at different times, upon detached subjects, the criminal occasionally adopts the bolder course of destroying *all the evidence*, unconnected with his own person, in one mass, and by a single act; to wit, by the superadded crime of arson. In how many cases this expedient may have been actually resorted to, and with success, it is, of course, impossible to say; it being a peculiarity of this offence, when thoroughly effectual, to destroy

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(a) In *Coll's* case, the prisoner, in addition to locking the room-door took the precaution of dropping the slide or cover over the key-hole, on the inside; but the persevering efforts of the person who was listening on the outside, removed this obstacle; and he was thus enabled to obtain a view of a portion of the interior of the room, through the key-hole. The principal object which then attracted his notice was a person in a bent position, as if stooping, in his shirt-sleeves, with his shoulders gently moving, in which position he remained for about ten minutes: during the latter part of which time he got up, took something off, or put something on a table, and returned to the same position. Testimony of *Asa H. Wheeler*.

In *Webster's* case, the janitor made several ineffectual attempts, (by looking through the key-hole, and cutting a hole in the door,) to see what was going on in the laboratory in which the accused had locked himself. He finally succeeded, by lying down with the side of his face to the floor, in looking under the door; and by that means had a view of the person of the accused as high up as his knees, and saw him carrying a coal-hod towards the furnace where several of the bones of the deceased were afterwards found. Bemis' Report, 112.

In *Peter Robinson's* case, a witness testified that, on the forenoon of the day on which the deceased disappeared, he endeavored to enter the prisoner's house by the front and back doors, and knocked for admittance; but no notice was taken of this, although, in going along by the side of the house, he heard a noise inside, like persons moving about. Pamphlet Report, 19.

all evidence even of its own commission. (a) But that it often occurs to the mind in desperate cases, has been clearly shown. In *Colt's* case, (b) according to the prisoner's own confession, it was one of the first means of concealment which suggested itself. In *Peter Robinson's* case, (c) the prisoner went so far as actually to propose to his own brother, to set fire to the house, under the floor of which it afterwards appeared, the murdered man was buried. In *Richard P. Robinson's* case, (d) the bed on which the murdered female lay, was set fire to, and the body itself partly burned.

Another object of concealment, on which especial attention is bestowed, in the crimes of robbery and theft, consists of the *fruits of crime* themselves. These are removed as quickly as possible, and hidden at a distance from the scene of the crime, (e) sometimes kept concealed upon the criminal's person, (f) and, sometimes secreted on the premises where the crime has been perpetrated. (g). Other precautions adopted in these cases, and coming strictly under the head of the *destruction* of evidence, consist of the removal of marks or names from stolen articles, such as plate and clothing, with the view of rendering their identification by the owner difficult or impossible; and this, in the case of plate, is often carried the further length of breaking up the articles, or melting them down into one undistinguishable mass. (h)

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(a) Alison's Principles of the Crim. Law of Scotland, 444; cited in Roscoe's Crim. Evid. 276.

(b) *The People v. Colt*, New York Oyer & Terminer, January, 1842.

(c) *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, Pamphlet Report, 17.

(d) *The People v. Robinson*, New York Oyer & Terminer, June, 1836

(e) *The People v. Johnson*, 2 Wheeler's Crim. Cases, 377.

(f) *Rex v. Smith, Varnham and Timms*, Wills, Circ. Evid. 289, 240.

(g) *Regina v. Courvoisier*, Id. 242. *The State v. Robinson*, Pamphlet Report, 82.

(h) *Rex v. Smith, Varnham and Timms*, Wills, Circ. Evid. 240.

The subjects of destruction or concealment which have thus far been considered, consist of inanimate objects, and physical substances and appearances, which, the criminal apprehends, may, in future, be converted into materials of evidence against him. But there is another class of subjects often of still greater importance than these, over which, however, his power is usually far more limited; namely, *persons* who have been, whether intentionally or otherwise, the observers of his conduct, either in preparing for, committing, or concealing the crime, or who have observed some important physical fact connected with it: and whose testimony, as judicial witnesses, he apprehends may be material, or feels may be decisive in fixing the crime upon him. Great pains are sometimes taken to get such witnesses out of the way, either by actually éloigning them, or sending them away, where they are under the criminal's direction; or by inducing them to remove to a distance, so as to be out of the reach of judicial process; and, in these cases, the effect of bribes is often freely tried. Attempts of this kind are also sometimes made after the apprehension of the criminal and before his trial. In *Carawan's* case (*a*) two letters written in the prisoner's hand, were found on the floor of the dungeon in which he was confined, imploring the parties to whom they were addressed, to spare no means to get the principal witness against him (his own nephew) to leave, and giving directions how to raise one thousand dollars for the purpose, if necessary. In other cases, the criminal is content, or forced to be content with enjoining, or requesting, or endeavoring to prevail on the witness to conceal and not to tell what he or she had seen. In the case of *Rex v. Burdock*, (*b*) a case presenting a most extraordinary instance of blindness or carelessness on the part of the criminal, to the obvious effects of her own acts and words, the witness, a servant, was cautioned, on leaving her house,

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(*a*) *The State v. Carawan*, Pamphlet Report, 63, 64.

(*b*) *Best on Presumptions*, § 296.

after the death of the deceased, not to tell any thing of the deceased, or that she had lived with her, or that she had ever seen the prisoner put any thing into her gruel, as people might think it curious. (a) Sometimes such requests are made in advance of any observation by the witness. In the Scotch case of *Nairn and Ogilvie*, (b) the female prisoner made the extraordinary request of the surgeon who had been sent for, to attend her husband, but who did not arrive till shortly after his death, that whatever he *might think* he discovered to be the cause of such death, he would *conceal it* from the world.

The presumption arising from any of these acts of destruction, suppression or eloignement of evidence, where they have been fastened upon the accused by satisfactory proof, is always unfavorable. (c) Assuming that an act of this kind was done with a motive, the logical inference is that it was done in order to get rid of something which would otherwise prejudice the actor. Hence, the conclusion is warranted, that the subject of action, if presented in evidence, would, in fact, operate against him. The principle of this presumption is a general one, applicable in civil as well as criminal cases; and is embodied in the well-known maxim, *Omnia præsumentur contra spoliatores*. (d) It must be borne in mind, however, that the getting rid of evidence, or of the sources, materials or instruments of evidence by any of the methods which have just been considered, is not, in itself, and necessarily, incompatible with the innocence of the party who is proved to have resorted to such expedients, as will be more fully shown under a future head.

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(a) See also the case of *Rex v. Smith, Varnham and Timms*, Wills, Circ. Evid. 240.

(b) 19 State Trials, 1294.

(c) 1 Stark. Evid. 490.

(d) As to the construction of this maxim, and the limits to its application, see Best on Pres. §§ 145, 148, 149.



## SECTION XVI.

*Fabrication or Forgery of Evidence.*

Another device resorted to by the perpetrators of crimes, with a view to escape detection and its consequences, is the positive *fabrication* of evidence, or rather, of the sources, materials or instruments from or through which evidence may, in future, be derived or conveyed. This fabrication is effected in two principal ways : first, *indirectly*, by intentionally producing on the senses of observers, impressions which shall, without fault on their part, lead to wrong ideas and conclusions, and thus, from the earliest stages, divert suspicion and inquiry to other objects and into other channels ; or, in the event of actual discovery and consequent trial, aid, in the form of testimony, in disproving the criminal charge :—secondly, *directly*, by prevailing upon individuals who, it is supposed or feared, may be called on for information or testimony, to mis-state one or more of the facts of the case ; or even to state, as facts, what they themselves know to be absolute falsehoods.

In regard to the first of these, it may be further observed, that the sources of wrong impressions are two-fold ; namely, *physical* appearances and objects, produced or arranged by the criminal's own act ; and *conduct* on his part, independent of such appearances and objects. These will now be considered in their order.

I. The employment of *physical* objects and appearances, for the purpose of deceiving or mis-leading the senses or conclusions of observers, has been otherwise termed *forgery of real evidence*. (a) This has been divided, by some writers, into two leading descriptions : that which has been

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(a) 8 Benth. Jud. Evid. 49. Best on Pres. § 220, *et seq.*

committed with a view of self-exculpation ; and that which has been committed maliciously, or with the specific intention of injuring some particular known individual. (*a*) This division, which has a sole reference to the *motive* of the act, will come under consideration in connection with the following divisions, which embrace the various forms of the fabricative process itself.

1. In the first form of fabrication which may be mentioned, the object and endeavor of the criminal are, to give such an appearance to the subject or scene of the crime, or both, as shall produce an impression that *no crime* at all has been committed, or that there has been no human agency in the case distinct from the act of the subject himself. Thus, where a person has been murdered, the body, limbs, and clothing are sometimes so arranged, and the instrument of death so placed, as to lead an observer to suppose that it was a case of suicide. In a case at Liege, in 1764, (*b*) where a citizen of that place had been killed by shooting in the head, the assassins laid a discharged pistol close to the body, in order to produce an impression that he had shot himself. In the case of *Green, Berry, and Hill*, who were tried in 1679, for the murder of Sir *Edmundbury Godfrey*, (*c*) the murder had been committed in Somerset-House, by strangling with a handkerchief ; but, in order to give it an appearance of suicide, the body, after having been kept some days, was carried out at night into the fields, run through with the deceased's own sword, and thrown into a ditch, his stick and gloves being laid upon the bank. In the case of *Mary Norkott* and others, (*d*) similar attempts were made to give to a murder the outward appearance of suicide.

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(*a*) *Id.* §§ 221—223. Another division mentioned by Mr. *Best*, includes those cases where the forgery has been committed under the influence of both these motives in combination. *Id.* § 224.

(*b*) Theory of Presumptive Proof, Appendix, case 2.

(*c*) 7 State Trials, 159, 178.

(*d*) 14 State Trials, 1824.

Another device sometimes resorted to, is to arrange the circumstances and appearances of death in such a manner as to convey the impression of its having been the result of *accident*; as by falling into a well, (*a*) being kicked by a horse, and the like.

Fabrications of this kind usually require, for their successful accomplishment, a degree of deliberation and coolness, as well as of skill, information, memory and forethought, on the part of their authors, which is rarely possessed or exhibited. Hence it happens that they are constantly accompanied by circumstances and appearances, which, either at once and upon their face, betray the fraud, or lead to the same conclusion by an indirect but not less convincing process. Thus, in the case at Liege, above mentioned, the assassins entirely overlooked the very material circumstance and consideration that the barrel of the pistol which they laid by the side of the murdered man, was of *smaller* bore than the one with which he had been shot, and that, if the bullet used should be found, and applied to the muzzle, the result would be to show conclusively that such pistol could not have been used to produce the wound. And it was, in fact, by this very process of comparison, that the fraud was detected. In the case of Sir *Edmundbury Godfrey*, the sword of the deceased had been driven so far through his body, that the point of it projected from his back, the distance of two hand-breadths; and yet, when it was drawn out, no blood followed, and there was no appearance of blood either on the body or in the ditch where it lay. And, besides this, it was found that no part of the clothing had been perforated. (*b*) In the case of *Mary Norkott* and others, the deceased was found lying in a composed manner in her bed, with her throat cut. But her

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(*a*) Mrs. *Spooner's* case, 2 Chandler's Am. Crim. Trials, 3, 13, 14.

(*b*) 7 State Trials, 184, 185. Marks of violence were also observed on the breast of the deceased, and his neck was broken.

neck was found to be broken, there was no blood in the bed, but blood was found under the bed, and a very great quantity on the floor, a bloody knife was found sticking in the floor, a good distance from the bed, with the point towards the bed, and, finally, there was the print of a thumb and four fingers of a left hand. (a)

Sometimes, this fabrication of evidence by the criminal is to a very limited extent, being resorted to with the view of removing the suspicious aspect of some single criminative circumstance, by assigning it to some natural cause. In an American case which has been already several times referred to, (b) the prisoner endeavored to avoid the effect of blood stains observed on her clothing, by opening an old wound on her finger, and causing the blood to flow from it.

2. In the next form of fabrication which comes to be considered, there is no effort made to disguise the general fact of *a crime* having been committed, but the whole aim of the fabricator is to divert suspicion from himself to *other* unknown persons. Thus, where a person has been murdered by an inmate of the same house, attempts have sometimes been made to give it the appearance of having been perpetrated by robbers entering from without, and the particular appearances of robbery itself have been very industriously counterfeited. In the late English case of *Regina v. Courvoisier*, (c) the simulation of a robbery by house-breakers, and of murder by the robbers, was quite elaborately contrived. In the first place, marks of violence were made upon the door of a pantry, leading to a back area, to indicate where an entrance had been forced. Drawers were pulled out, and a variety of articles of clothing, plate, and valuables were scattered about, in different parts of the

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(a) 14 State Trials, 1326.

(b) *The State v. Cicely*, a slave, 13 Smedes & Marshall, 205.

(c) Burke's Trials, connected with the Aristocracy, 461. Wills, Circ. Evid. 241.

house, and some were bundled up, as if in readiness to be carried off. Finally, certain articles around the bed on which the murdered man lay, were so arranged as to create the impression that he had been killed while reading. A book was found on the floor, his spectacles lay upon it, and there was a candlestick about four or five feet from the bed, with the candle burned to the socket. (a)

But in this, as in the preceding description of cases, the most ingenious frauds frequently carry with them the means of their detection. In the case of *Courvoisier*, just cited, the marks on the door appeared, on examination, to have been made from the inside. The awkward manner in which the articles were disposed and scattered about, showed that it was not done by a professed thief. And the candle was found to be placed in such a situation, that it would not have afforded sufficient light to enable the deceased, in the position in which his body was found, to read a single word by it. (b)

3. In the next form of fabrication which occurs for consideration, the criminal more directly attempts to inculcate a *particular* individual, not from any actual malice against such individual, (who may be an entire stranger,) but solely as the most effectual means in his power, of exculpating himself. The fabrication in these cases is a simple process, consisting, usually, of a single act, suggested on the emergency of the moment; and is accomplished by leaving with the person, or on the premises of the selected individual,

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(a) As further instances of this species of fabrication, may be mentioned those cases of robbery and murder, where the criminal inflicts slight wounds upon his own person, in order to confirm his own statement of an attack made upon him by others. This was contended to have been the fact in the singular case of *Archibald Bolam*, an actuary of the Savings Bank at Newcastle, England, who was tried in 1839, for the murder of one *Millie*, a clerk in the bank. 18 London Legal Observer, 837.

(b) Burke's Trials connected with the Aristocracy, 465, 466. Wills, Circ. Evid. 242, 243.

some article or object of criminative evidence, such as the instrument or fruits of the crime, or even the subject of the crime itself. A fabrication of this kind was effectually practiced, at the expense of the life of an innocent individual, in the case of a horse-thief mentioned by Lord *Hale*, and given on a former page of the present work. (a) This case has been paralleled in its circumstances, though not in its tragic consequences, by another, which happened in England as late as the year 1827. Two oxen had been stolen; and the thief, while driving them away, finding himself pursued, and meeting a person on the road, made a bargain with him to drive the animals for him, to London, and then fled. The person having the oxen in charge, being apprehended, was tried for the crime, convicted, and narrowly escaped transportation for life. (b)

In the case of *John Jennings*, who was executed at Hull, in the year 1742, a fabrication of this kind was practiced with a fatal result to the individual who was the subject of it. One *Brunell* who kept the Bell Inn, where *Jennings* was employed as a waiter, had robbed a gentleman on the road, about two miles from his inn, late in the evening, of a purse containing twenty guineas. It happened that the person robbed stopped at the inn that night, and, having gone into the kitchen to give directions for his supper, related to several persons present, what had befallen him; adding that every guinea in the purse he was robbed of had been particularly marked, and that, by that means, the robber would, most probably, be detected. *Brunell* had just before paid away one of the guineas; and, on hearing this statement, became so impressed with the certainty of his detection, that, in order to save himself, he resolved to sacrifice *Jennings*. He accordingly went to the room where the waiter lay asleep, and conveyed into one of his pockets the purse

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(a) *Ante*, p. 212, note (a).

(b) *Rex v. Gill*, Wills, Circ. Evid. 54, 55.

with the nineteen marked guineas. He then communicated to the traveller his suspicions that the waiter was the man who had robbed him, basing them upon a false statement of facts; and concluded with proposing a search of the man's person, as a means of verifying such suspicions. The traveller assenting to this, they both went up to the room where *Jennings* slept, and searched his clothing. The result was, that the purse was found in one of the pockets, and the money identified by the traveller as that of which he had been robbed; and upon evidence of these facts, confirmed by the perjured statement of the landlord, *Jennings* was convicted and executed. (a)

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(a) Theory of Presumptive Proof, Appendix, case 1. In an old case which occurred near Dublin, in the year 1681, the facts were these. Two persons, strangers to one another, put up at an inn, one of them having a considerable amount of money. After they were in bed and asleep, the inn-keeper took the sword of the person who had the least money, killed the other, and put back the sword into the scabbard, all bloody. The person whose sword was made use of, rose in the morning early, called for his horse, and prosecuted his journey. As soon as he was gone, the inn-keeper went into the room where the murdered person lay, and, with a seeming amazement cried out, that one of his guests was murdered; and, upon search, found that his money was gone. Every one suspected the person who had just left the inn; upon which, he was pursued and overtaken, and, the inn-keeper drawing his sword, it was found bloody; which was considered as affording so strong a presumption of guilt, that, being tried for his life, he was found guilty. But, upon some circumstances being shown in his favor, the judge, having some scruples, obtained a reprieve; and, in the interval, the inn-keeper confessed the crime, by which the innocent man's life was saved. Case reported in Brackenridge's Law Miscellanies, p 507, as extracted from Malcome's Miscellaneous Anecdotes, published A. D. 1811. A similar case is mentioned in the London Legal Observer for August 20th, 1836, as having occurred at Norwich, England, in 1684, where the person, whose sword was thus fraudulently used, was, at the time, in a senseless state, arising from intoxication; and which resulted in his actual execution. 12 London Legal Observer, 328.

As a singular instance of the use of the *subject* of a crime in fabricating evidence, the Scotch case of *Sawney Cunningham*, (A. D. 1635,) may be referred to. In this case, the deceased had been decoyed into the murderer's house, and having been dispatched there, his body was carried out at night to his own residence, and there placed in a sitting posture. It was discovered in

4. The last form of fabrication of evidence, by means of physical objects, remaining to be considered, embraces those cases in which a person, having a *particular malice* against some known individual, and having committed a crime, either for his own gain or gratification, or, possibly, with the sole view of injuring such individual, proceeds to fabricate certain physical facts and appearances, which shall, on their face, connect the latter with the crime so closely, as to lead to his arrest and trial, on suspicion of having committed it. This has been distinguished as *malicious forgery* of real evidence. (a) Stealing an article, conveying it into another's possession, and contriving that it shall be found there by the owner, is perhaps the simplest form of this malicious fraud. Committing a murder with the knife of another, and having his shoes on, (for the purpose of making foot-prints,) and then returning the articles into his possession, with the view of their being found there, and used as evidence against him, is a more aggravated form of the same class of fabrication. A bad case of this kind is given in the appendix to the "Theory of Presumptive Proof." (b) A woman having resolved to take the lives of her father and brother, accomplished her purpose by the following means. Her father having gone from the house to a hovel, to milk a cow, and there being snow on the ground, she followed him

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this posture, by a friend of the deceased, who was staying with him; but he, fearing to be thought the murderer, and suspecting the cause of his death, carried the body back to *Cunningham's* house door, where he set it down. The door being soon after opened by *Cunningham's* wife, the body fell into the house. But *Cunningham*, nothing daunted by this circumstance, took up the body again, with the design of carrying it to the river and throwing it in. On his way, he was induced to change his purpose, and finally, by an artful contrivance, succeeded in conveying the corpse into the possession of some thieves, where it was found; and the thieves, being tried for the murder, were executed. 5 London Legal Observer, 42. Celebrated Trials, 297. (Phil. 1835.)

(a) Best on Pres. § 223.

(b) Case 10. It should be observed that this case is altogether anonymous, and contains not a single particular of name, time, or place.



with a hammer belonging to her brother, and with her brother's shoes on, killed him by beating out his brains, and then returned to the house, and deposited the hammer in the corner of a private drawer. She then gave information to the neighbors, who proceeded to make a search. The foot-prints on the snow were compared with the brother's shoes, and found to correspond; and his hammer was discovered in the drawer, with spots of blood, and other evidences of its use upon it. On evidence of these physical facts, together with the woman's fabricated statement of the case, the brother was convicted of having murdered the father, and suffered death.

Under this head may also be classed the case reported in the *Causes Célèbres*, where the assassin, having got possession of a knife and cravat belonging to the servant of the woman he intended to murder, and also of some of his hair, committed the crime with the knife, which he left bloody, near the body; and then placed in one hand of the corpse, the cravat, and in the other the hair; thus giving an appearance of their having been torn from the person of the servant, in the mortal struggle. (a)

II. But the fabrication of evidence, or of the materials or sources of evidence, is not, by any means, confined to mere physical objects and appearances. By his own language and conduct, the criminal often strives to produce impressions upon observers, calculated either to prevent the formation of any suspicions of his guilt, or to remove them, if formed; or, at least, to diminish their force. In many recorded instances, his whole conduct, from the moment after the offence has been committed, to the time of his arrest,

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(a) 5 *Causes Célèbres*, 488; given, in the original French, by Mr. *Bentham*, (8 *Jud. Evid.* 255,) and translated by Mr. *Best*. *Best on Pres.* § 210.

and sometimes later, has been a tissue of dissimulation, mendacity, and fraud.

The following examples of this species of fabrication, to which the distinctive appellation of "moral" may be given, will serve to show the varieties of artifice to which a mind conscious of guilt, will resort, in order to escape its apprehended consequences.

1. *Counterfeiting alarm*, and running from the scene of crime in pretended *terror*. In the case of *Swan and Jefferys*, (a) immediately after the murder was committed, the female prisoner ran out of the house, in her night-clothes, to a neighbor's, crying for help, and screaming "murder! fire! thieves!" The house was examined, but there appeared no marks of any person having been in it, except those belonging to the family, and no traces were found on the outside, of any person having quitted it, the dew on the grass being quite undisturbed.

2. *Making inquiries* after the deceased, and expressing *surprise* at his absence. In Mrs. *Arden's* case, (b) the female prisoner, after having actually taken part in the murder of her husband, and helped to carry his body out of the house, sent her servants out to search for their master, directing them to go to places which he mostly frequented. In the very similar American case of Mrs. *Spooner*, (c) the same expedient was resorted to by the female prisoner, although she knew that her husband had just been murdered, and that his body was then lying in the well near her own door. In the cases of *Colt* (d) and *Webster*, (e) inquiries were made by the prisoners, after the deceased, with all the

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(a) *Rex v. Swan and Jefferys*, 18 State Trials, 1193. 5 Lond. Legal Obs. 425.

(b), 5 London Legal Observer, 59.

(c) 2 Chandler's American Crim Trials, 8.

(d) *The People v. Colt*, New York Oyer & Terminer, January, 1842; testimony of *Hugh Monahan*.

(e) *Commonwealth v. Webster*, Bemis' Report, 106, 115.

air of persons who knew nothing of the crime which had been perpetrated.

3. *Pretending violent sorrow* for the death or disappearance of the person murdered. In the case of Mrs. *Arden*, (a), just cited, when the servants who had been sent out to inquire for the husband, returned without any tidings, the female prisoner began to exclaim and weep, which brought in some of her neighbors, who found her very sorrowful, and lamenting her case, because she could not find out what had become of her husband. And this kind of conduct is sometimes exhibited by criminals of the other sex. In *Philip Standsfield's* case, (b) the prisoner cried and lamented when his father's body was found; but within an hour after it was brought from the water, he got the buckles out of the shoes of the deceased and put them in his own, having previously taken gold and money out of his father's pockets.

4. *Expressing an opinion*, in cases of the sudden disappearance of a person, that he had *gone away*. Sometimes, such opinions are expressed in language conveying an imputation upon character. In *Peter Robinson's* case, (c) the prisoner stated, as his belief, that the missing person, who was then lying dead under his own basement floor, had "run away." In *Carawan's* case, (d) the prisoner, speaking of the deceased, told a witness he thought he had "cut out."

5. *Spreading reports* that a murdered and missing person had gone to a *distance*, or had been *seen in various places*, remote from the scene of the crime, and, in some instances,

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(a) 5 Lond. Legal Observer, 60.

(b) 11 State Trials, 1398.

(c) *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841. Pamphlet Report, 12.

(d) *The State v. Carawan*, Beaufort, (N. C.) Superior Court, Fall Term, 1858. Pamphlet Report, 56.

near it. In *Drayne's* case, (*a*), where a traveller had been robbed and murdered at an inn, and his body buried in the back yard; a report was, soon after, spread, that he was gone to Amsterdam; next, that he was at Cork; and, finally, that he was at Barbadoes; leading his wife to make diligent search for him at all these places. In this way, suspicion was, for several years, effectually diverted from the scene of crime, and the real criminals.

6. *Writing letters*, with a similar view to prevent or mislead inquiry. (*b*) Of this species of fabrication, there are two varieties,—letters written by the criminal, in his own ordinary hand, and over his own signature; and letters written by him, in disguised hands, and with fictitious signatures, or without signatures.

Of the first of these species of fabrication, the English case of *William Corder* (*c*) furnishes an apt illustration. The prisoner had agreed to marry a young woman living at Polstead, with whom he had been intimate, and left her parents' house with her, one day, stating that he was going to Ipswich, to marry her the next day. Returning without her, he said he had left her at Ipswich. To subsequent inquiries made by her parents, who became uneasy at hearing nothing from their daughter, he said she was living at Yarmouth. On leaving Polstead, he said he was going to Yarmouth, to take her with him, and be married immediately. Sometime after, he wrote a letter to her father, from London, stating that he had married his daughter, and that they had taken lodgings at Newport, in the Isle of Wight, and giving a variety of minute particulars about her; saying, among other things, that she had previously written to her father, and expressing astonishment that the letter had not been

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(*a*) 5 London Legal Observer, 123.

(*b*) The letters themselves, when written, belong to the class of *physical facts*.

(*c*) Celebrated Trials of all Countries, 219. (Phil. 1835.)

answered. (a) All these were pure fabrications; the fact being, that the prisoner had murdered the missing female on the same day on which he left her parents' house with her, and had buried her body under the floor of a barn, not far distant.

Of fabrication, by writing anonymous letters, in disguised hands, the case of *Commonwealth v. Webster* (b) furnishes a signal example. In this case, three letters were written,—two of them over fictitious signatures, the third, without signature,—and sent, on different days, through the Post-office, addressed to the City Marshal of Boston, about the time when searches were being made for the missing Dr. *Parkman*. In the first of these, signed "M. ———, Capt. of the Darts," it was very briefly but positively said, that the Doctor would be found "murdered on Brooklyn Heights." The next letter, signed "Civis," recommended that cellar floors and out-houses should be more closely examined. It suggested, also, that the body had probably been "cut up," put into a bag with heavy weights, and sunk in some part of the harbor or river; and recommended that cannon should be fired, to cause it to rise to the surface; also, that the cellars of the houses in East Cambridge should be examined. The last and most singular of the three letters was without signature, written on a mere scrap of paper, and bore the appearance of being scrawled with a stick or brush dipped in ink. (c) It purported to be written by one who had been an unwilling witness of the transaction, or some part of it; and communicated the fact (as all the witness dared to say,) that Dr. *Parkman* was taken on board "the ship

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(a) There was another letter subsequently written by the prisoner to the father, and a previous one to another individual, in which the same course of false and fraudulent statement was maintained, and carried out in some of the minutest particulars. *Celebrated Trials*, 219, 220.

(b) *Bemis' Report*, 210, 211.

(c) The instrument supposed to have been used, and called "a cotton pen," was produced in court, and proved to have been seen in the laboratory of the accused. *Bemis' Report*, 173.

Herculan"; and that one of the men gave the writer the doctor's watch, but he was afraid to keep it, and threw it into the water, on the right side of the road to the long bridge to Boston. (a) There was strong evidence to show that all these letters were written by the prisoner himself, and, indeed, in his confession, he admitted that he wrote the last; although he knew that the missing person had been killed by himself, and that his dismembered remains were then hidden on his own premises.

7. *Spreading reports* as to the *movements* of the suspected party, in order to prevent pursuit, or confound and defeat inquiry. These often and designedly find their way into public prints, and sometimes present serious obstacles to the course of justice. In the French case of M. *D'Anglade*, (b) who suffered for a robbery committed in Paris, by others, in 1687, one of the real criminals had caused a paragraph to be inserted in a newspaper, that the guilty parties had been executed for some other crime, at Orleans; hoping, by this means, to stop any further inquiry.

8. *Spreading reports* as to the *cause* or manner of the death of the deceased party. This expedient has been resorted to, in some cases of poisoning. In the celebrated case of the murderers of Sir *Thomas Overbury*, (c) the body of the deceased being found covered with eruptions produced by the extraordinary poisons administered, it was reported that he had died of a foul disorder. In *Donellan's* case, (d) the death of the deceased was attempted to be

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(a) A fac-simile of this singular production, which the accused after solemnly denying, admitted he wrote himself, (Bemis' Rep. 458, 571,) may be found in Bemis' Report of the trial, between pages 210 and 211. The letter itself ran thus: "Dr. *Parkman* was took on Bord the ship herculan and this is al I dare to say or I shal be kiled Est Cambrge one of the men give me his watch but I was feard to keep it and thowd it in the water rightside the road to the long brige to Boston."

(b) 5 London Legal Observer 231, 234.

(c) 2 State Trials, 918.

(d) Gurney's Report, 1781. Celebrated Trials, 148. (Phil. 1835.)

accounted for, in the same way. In the case of *Commonwealth v. Webster*, (a) the accused took particular pains to give currency to a report that a woman had seen a large bundle put into a cab, that she had taken the number of the cab, and that they had found the cab covered with blood.

III. The last species of fabrication of evidence remaining to be considered, is that which is addressed directly to the great medium of all evidence,—the *testimony of witnesses*. Instead of fabricating facts and appearances, and trusting to impressions which they may make upon observers, who may, in the character of judicial witnesses, report them, in future, to the investigating tribunal, the criminal, in carrying out this species of fraud, confers immediately with the observer (and intended witness) himself: endeavoring, sometimes, merely to weaken, distort, or destroy true impressions which have been formed, (b) or to deepen wrong but honest impressions where they may exist; but sometimes proceeding the bolder length of attempting to corrupt the integrity of the witness, and to prevail on him to state and make oath to, as facts, what both the criminal and witness know to be absolute falsehoods. A few recorded instances of conduct of this description, involving attempts to commit the offence of subornation of perjury, (c) will now be noticed.

In the Scotch case of *Nairn and Ogilvie*, the female prisoner having heard that the sheriff was coming to the house of the deceased, to make a preliminary examination of witnesses in the case, endeavored to induce one of the servants of the deceased to say, among other things, that she had

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(a) Bemis' Report, 115, 187. Another version was, that a mesmerized woman had named the number of the cab which took Dr. *Parkman* off, and that the cab had been found with spots of blood on it. *Id.* 185, 187.

(b) See *Commonwealth v. Webster*, Bemis' Report, 188, 189.

(c) 3 Benth. Jud. Evid. 167. 2 Russell on Crimes, 596. Wharton's Am. Crim. Law, 768, (ed. 1855.)

drunk some of the tea which the prisoner mixed in a bowl for the deceased, before the latter tasted it, and that she likewise drank off what the deceased left of it, and that she was in the closet with the prisoner when she mixed the tea, (such statements being wholly false ;) adding, as an inducement, that if she would say as thus directed, the prisoner would stand by her and no harm should come to her, that the witness should go with her wherever she went, and while she had a half-penny, she should have the half of it. (a) In *Riembauer's* case, the criminal attempted to suborn witnesses to prove a confession of the murder by another person. (b)

Evidence, or rather testimony, fabricated in this way, is frequently intended as a means of proving an *alibi* on the part of the criminal. In the late English case of *Regina v. Rush*, (c) the criminal, on returning to his house, after an absence of more than an hour, on the night when the deceased persons were shot, said to the woman who lived with him,—“If any inquiries should be made, you say that I was not out more than ten minutes.” In *Carawan's* case, (d), it was testified by a nephew of the prisoner, who had seen him leave his house the day the deceased was shot, that his uncle offered to give him a negro, if he would say that he was at home all that day.

The fabrication or corruption of evidence has been very justly considered as creating, against the party who has had recourse to such a practice, a presumption even stronger than the destruction or suppression of it. (e) The detection

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(a) 19 State Trials, 1284, 1285. These requests were concurred in by the male prisoner, then present. *Id. ibid.* And see another attempt of a similar kind, previously. *Id.* 1288.

(b) 8 Lond. Legal Observer, 278.

(c) Burke's Trials, connected with the Upper Classes, 478.

(d) *The State v. Carawan*, Beaufort County, (N. C.) Superior Court, Fall Term, 1853. Pamphlet Report, 52, 53.

(e) See 2 Stark. Evid. 490, 491.



of the forgery of real evidence is generally a strong circumstance against an accused individual ; although standing alone, it cannot safely be considered as conclusive, owing to the fact that innocent persons have occasionally been betrayed into the weakness of resorting to it. (*a*) But the detection of a deliberate attempt to corrupt the integrity of a witness (constituting as it does, a substantive offence in itself,) (*b*) is a circumstance which seems to be of force enough to exclude the application of almost any infirmative supposition whatever.

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## SECTION XVII.

### *Possession of articles of Criminative Evidence.*

The effectual perpetration of a crime, in most cases, (*c*) necessarily brings the perpetrator into immediate personal contact or connection with certain *physical objects* ; such as the subject of the crime and its appendages, the instrument with which it is committed, and the fruits of it. It also frequently subjects his own person, and the instrument which may have been employed, to *impressions* of a certain kind, which criminal action naturally produces ; such as stains of blood, and the like. When, therefore, after a crime has been committed, objects or articles of this description, or bearing indications of a criminal use, are found in the possession of a particular individual, especially if he have been suspected on other grounds, it becomes, on its face, a cir

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(*a*) Best on Pres. §§ 149, 220. 2 Stark. Evid. 491.

(*b*) 2 Russell on Crimes, 596. Wharton's Am. Crim. Law, 768.

(*c*) The exceptions have been mentioned under a previous head. See *ante* p. 389.

cumstance of a criminative tendency against him, and often proves decisive in establishing a conviction of his guilt. The subsequent connection, thus produced, harmonizes so well with the contemporaneous connection above adverted to, as to justify the belief, (in the absence of any satisfactory appearances to the contrary,) of its having actually grown out of it. And, indeed, so cogent is its effect, on the plainest principles of presumptive reasoning, that, the fact of finding the objects in such situations being adequately proved, it very frequently throws upon the individual designated the full burden of explaining how they came to be there. In short, an innocent possession, in such cases, can be made out only upon one of three suppositions:—either that the articles in question have been placed in such situations by the real criminal, or by some third person, without the knowledge or consent of the individual practiced upon, and for the purpose of averting suspicion from himself, or maliciously attaching it to the other; or that they have come into such situations by accident, and without any human or responsible agency; or, if they have been knowingly and voluntarily acquired by the individual in whose possession they are found, that such acquisition has been in entire ignorance of their previous criminal uses and associations.

Taking the crime of murder, as being the most abundant in evidences of this description, the following criminative objects may be particularized:—the instruments of the crime; (a) articles of clothing belonging to the deceased, and worn by him; (b) small articles carried about the person of the deceased, such as a watch, (c) a purse, (d) a

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(a) *Rex v. Thurtell and Hunt*, Celebrated Trials, 7, (Phil. 1835.)

(b) *Drayne's case*, 5 Lond. Legal Observer, 124. *Mrs. Spooner's case*, 2 Chandler's Am. Crim. Trials, 15, 16.

(c) *Id. ibid.* *The People v. Colt*, New York Oyer & Terminer, January, 1842. *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841.

(d) *The State v. Cicely*, 13 Smedes & Marshall, 206.

locket, (*a*) money, (*b*) keys, (*c*) papers (*d*) and the like ; larger articles carried in close proximity to the person, such as a carpet-bag, (*e*) an umbrella, (*f*) and the like ; the subject of the crime, or body of the deceased itself ; (*g*) the remains of the body ; (*h*) and the material fruits of the crime. (*i*) Other offences present a much narrower range of criminative objects ; some being confined, for the most part, to the instruments ; others to the instruments and fruits of the crime, in conjunction ; and others, again, almost exclusively to the fruits. In arson, the finding of incendiary contrivances, and combustible or inflammable materials and substances, in the possession of the accused, at the time of his arrest, is always an important circumstance. (*j*) And so, in burglary, is the finding of burglars' tools, (*k*) and, in forgery and counterfeiting, the finding of implements and materials for counterfeiting, (*l*) in similar situations. And the articles and objects, thus found, are often allowed to be

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(*a*) *Regina v. Courvoisier*, Burke's Trials connected with the Aristocracy, 467.

(*b*) *The State v. Robinson*, Middlesex, (N. J.) Oyer & Terminer, March, 1841.

(*c*) *Rex v. Smith, Varnham and Timms*, Wills, Circ. Evid. 240.

(*d*) *The State v. Robinson, ubi supra. Commonwealth v. Webster, Bemis' Report*, 149.

(*e*) *Rex v. Thurtell and Hunt*, Celebrated Trials, 11.

(*f*) *Riembauer's case*, 3 Lond. Legal Observer, 243.

(*g*) *The State v. Robinson, ubi supra.*

(*h*) *Commonwealth v. Webster, Bemis' Report*, 117, 118.

(*i*) See the next section.

(*j*) In the English case of *James Hill*, there were found upon the person of the prisoner, when apprehended, among other articles, a snuff-box with tinder, a small powder-horn with gunpowder, a large nail piercer, a striking tinder-box primed, two bundles of matches dipped in brimstone, and a phial half full of spirits of turpentine. 20 State Trials, 1345.

(*k*) See *Commonwealth v. Williams*, 2 Cushing, 582.

(*l*) *The State v. Antonio*, 2 Const. R. 776, 784, 791, 792, 797. 3 Phil Evid. (Cowen & Hill's notes, Van Cott's ed.) 629. As to the effect of finding counterfeit money in the possession of an accused party, see *The People v. Gardner*, 1 Wheeler's Crim. Cases, 23. 8 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) 454. Wharton's Am. Crim. Law, 292, 298. (ed. 1855.)

brought into court, and exhibited to the jury, as part of the evidence in the case. (a)

But, in estimating the criminative effect or tendency of the fact of possession of objects like these, the *character* of such possession itself must always be taken into view ; and this leads to the inquiry what circumstances may be considered as constituting a sufficient possession in such cases.

The two states or situations which may be said to represent and comprise the general fact of possession, in its fullest extent, are, the being found on the *premises*, and the being found on the *person* of the individual charged as the possessor.

In estimating the effect of finding an article of criminative evidence upon the *premises* of a particular party, the character and extent of such premises always require to be considered ; for, upon these circumstances depend the closeness and force of the *connection* in which, as already observed, the criminative effect itself consists. Where such premises are easily accessible from without, and especially when they are of considerable extent, the mere fact of finding upon them a material object or article of even the highest criminative efficacy,—such as the dead body of a person, with obvious marks of a violent end,—would not, necessarily and of itself, have the effect of putting the occupant of the premises upon a defensive explanation how such body came to be there ; especially if it were found at a spot remote from the party's residence, rarely in actual use, or for any other reason rarely visited. (b) It is

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(a) In the late case of *Commonwealth v. Williams*, a number of burglars' tools found in the prisoner's possession at the time of his arrest, consisting of shotged colts, skeleton keys, key-bits, an instrument called a safe-borer, and a screw-wrench, were allowed to be exhibited together to the jury on the trial, although only some of them appeared to be adapted to the commission of the particular offence charged. 2 Cushing, 582.

(b) Such, for instance, as the locality in which the body of the deceased was concealed by burial, in the case of *The State v. Carawan*. *Ante*, p. 405.

obviously possible, and by no means improbable, that a murder might be committed on the grounds of another, and with an instrument taken from his premises, and the evidences of the crime left on the spot, without the knowledge of the occupant, and for days and weeks before any discovery by him.

The case would be materially different, if the body of a murdered person were found upon premises less accessible from without, and, presumably, in the daily use of the occupant and subject to his constant supervision, such as the enclosed yard of a city tenement; for the circumstances, in such a case, would tend to raise a presumption, in the first instance, that the object could not have come upon the premises, without the knowledge or sanction of the occupant himself. (a) The more contracted the limits of the locality become, the more permanently proximate to the person of the occupant, and the more constantly in his presumed use, the stronger would this inference in itself become; as if the body should be actually found *in the party's house*, and particularly, if found *buried under it*. (b) By such a gradation, we finally reach that class of localities, which are proved to be in the constant and exclusive occupancy of one particular individual, and from which all other persons are, by his own act, intentionally and permanently shut out; as where the dead body of a missing person, or portions of it, are found in a strictly private receptacle, and actually under the lock and key of the occupant. (c) In such a case, the burden of explaining how the object came to be where it was found, would undoubtedly be thrown upon the occupant, with its fullest possible force.

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(a) See the remarks of Mr. *Greaves*, in reference to the fact of finding stolen goods in another's possession. 2 Russell on Crimes, 124; Greaves' note (g).

(b) See the case of *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841.

(c) See the case of *Commonwealth v. Webster*, Supreme Court of Massachusetts, March, 1850.

In proportion, then, as the quality of strict *exclusiveness* becomes attached to the occupancy of premises, is the fact of finding upon them objects of the description already enumerated, invested with a criminative force against the possessor or occupant. (a) The practicability of bringing and leaving articles of the highest degree of criminative power, upon premises of large extent and easy access, without even the knowledge of the occupant, has already been shown. A similar state of things may exist where the limits of the premises are comparatively small, and access to them comparatively difficult, such as a city tenement of the ordinary kind ; it being obviously possible, even under such circumstances, for articles, in themselves of a very criminative quality, to be introduced and secreted upon the premises, (as by a domestic, or the confederate or visitor of a domestic,) without any knowledge, or even suspicion, on the part of the occupant. This, however, would naturally depend, in a material degree, upon the *bulk* and *quantity* of the articles themselves, as well as the attending circumstances. Some descriptions of burglars' tools, and implements for counterfeiting, and even packages of counterfeit money, might be clandestinely introduced into a house, by agency of the kind just mentioned, with the greatest ease.

The fact of finding an article of criminative evidence upon the *person* of a particular individual, constitutes, on its face, the closest physical connection with crime that can possibly be established against him ; and it is accordingly constantly relied on in criminal practice, as one of the surest grounds of conviction. In general, the possession in these cases is, in its nature, and of necessity, *exclusive*. There are, however, exceptions, which should never be overlooked ; it being possible, as has been occasionally proved, that there

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(a) As to the importance of the quality of exclusiveness in the possession of stolen property, see the next section.

may be possession without consciousness or knowledge of the fact. A natural and very adequate test for ascertaining whether this consciousness exists or not, is often afforded by the same circumstances which were mentioned under the last head,—the *bulk* and *quantity* of the article found. It is possible that an object of small size and little weight, such as a coin of which a murdered person has been robbed, may be conveyed into the pocket of an entirely innocent individual, and remain there some time, without his being aware of its presence. And that even a considerable quantity of coin may be introduced into the clothing, while detached from the owner's person, during sleep; (*a*) or an article worn by him converted into an instrument of crime, during the same state, or during the insensibility of intoxication, (*b*) has been shown in cases of actual occurrence. But where the pocket of a man's coat, while in actual wear upon his person, is found stuffed with a parcel of visible bulk, (consisting of articles belonging to a person recently murdered;) (*c*) or where a bulky parcel is found concealed under his outer garment, (*d*) the defence that he was not aware of the presence of such articles would, of course, be excluded. The same remark would apply where the article is connected with the individual in such a manner as necessarily to imply voluntary and intentional action on his part; as where an article of clothing, or a watch or locket, belonging to another, is found actually *worn* upon his person.

In cases of the apparent possession of articles of criminative evidence, the fact that such possession is a *concealed* one, is important, though not always conclusive or uniform

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(*a*) See the case of *John Jennings*, Theory of Presumptive Proof, Appendix, case, 1.

(*b*) See the cases mentioned in the note, *ante*, p. 426.

(*c*) See the case of *Rex v. Smith, Varnham and Timms*, Wills, Circ. Evid. 240.

(*d*) See the case of *Rex v. Beards*, Wills, Circ. Evid. 102.

in its effect. (*a*) Where the body of a murdered person has been found on a remote part of another's land, the circumstance that it was concealed, wholly or in part, by *burial*, would not ordinarily add to its criminative effect against such person. (*b*) But the case would be very different if the body were found buried under the floor of the party's *house*. So, where a watch, identified as having belonged to a murdered person, is found carefully wrapped up and secreted in another's trunk, (it being in a state fit for use,) the fact of concealment undoubtedly adds to the effect of the general fact of possession. (*c*) It is a natural badge of guilt, harmonizing with the results of general observation. A person who had innocently acquired possession of such an article, (as by purchase, even supposing it derived from a criminal source,) having no inducement to secrete it, would naturally wear it openly upon his person. But it by no means necessarily follows, *vice versa*, that the open possession and use of such an article is *always* indicative of innocence. (*d*)

The fact, that the possession charged is a *recent* one, is also important, especially where the object or article itself is of such a description as to pass easily and rapidly from one person to another. (*e*) It would make a material difference whether a garment, for instance, which had belonged to a murdered person, and was found on the person of another, was so found the day after the crime, or a year afterwards.

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(*a*) As to the importance of the fact of concealment of stolen property, see the next section.

(*b*) See *ante*, p. 489.

(*c*) So, where a counterfeit bill is found concealed in the cuff of the prisoner's coat, on his arrest. *Stewart's case*, 2 City Hall Recorder, 87.

(*d*) See *Rex v. Thurtell and Hunt*, Celebrated Trials, 6, (Phil. 1885.) *Mrs. Spooner's case*, 2 Chandler's Am. Crim Trials, 15. *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841; Pamphlet Report, 16, 19.

(*e*) As to the importance of this quality in the case of the possession of stolen property, see the next section



So, where an individual has been seen to leave a building, which shortly after is found to be on fire, and he is immediately apprehended, and searched, and a variety of incendiary contrivances, instruments and materials are found upon his person, the fact would have a strongly criminative effect against him ; whereas, the finding of the same articles in the same situation, upon his arrest a month or two afterwards, would (however indicative of general disposition and habits,) have no weight at all in the particular case. On the other hand, in a case like that of *Moses Drayne*, (*a*) a lapse even of several years between the disappearance of an individual, and the finding of his remains on the premises of another, would not, in the least degree, diminish the criminative effect of the fact itself.

The effect of the possession of such articles as have been enumerated in this section, is, for the most part, the same, whether the articles themselves are actually found in the party's possession, at the time of his arrest, or proved to have been in his possession shortly after the commission of the crime, but subsequently transferred to others. (*b*) Change of possession of an article obtained by criminal means, is constantly resorted to, as a substitute for its destruction or concealment, especially where it is found or believed to be of considerable value. Watches, for instance, are frequently disposed of to silversmiths and others, either in the way of sale or exchange ; and the testimony of such persons, as to the transaction, is always of great importance in establishing charges of guilt. The false statements, also, which are almost uniformly resorted to, in these cases, as means of accomplishing and at the same time concealing the

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(*a*) 5 London Legal Observer, 123.

(*b*) The advantage, in the former case, is that the articles may be preserved and produced on the trial, for the inspection of the jury, and identified in their presence. But even where possession has been changed, articles are frequently successfully traced out, recovered, produced in court, and identified, with the same effect.

transfer, are strong corroborative circumstances against the accused. (a)

To pursue the subject of this section into any further details, would involve considerations belonging to the head of *exculpatory* evidence, to which a distinct place, in the arrangement of the present work, has already been assigned. But there is one of the objects of criminative evidence already enumerated,—the *fruits* of crime,—to the possession of which such peculiar importance is attached, as a means of indicating the perpetrator of certain offences, as to entitle it to a separate consideration, which will accordingly be given it in the following section.

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## SECTION XVIII.

### *Recent Possession of the Fruits of Crime.*

Among articles of criminative evidence, considered as subjects of possession, the *fruits of crime*,—that is, the material objects of more or less value, acquired by means and in consequence of its commission,—occupy a very important place. These occur most frequently for consideration in the crimes of larceny and robbery; constituting, in fact, the subject-matter of the offence itself. (b) The connection which these articles establish between the party possessing

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(a) In the case of *The State v. Robinson*, the watch of the deceased was taken by the criminal to a silversmith's, in Newark, N. J. and exchanged for another. On being asked at the time, how he came by the watch, he falsely represented that he had bought it at auction in New York; and when further asked for his name, to put into the watch, he gave a false name. Pamphlet Report, 16. And see the case of *Rex v. Howe*, Wills, Circ. Evid. 236.

(b) 8 Benth. Jud. Evid. 31.

them and the crime committed, is, on its face, peculiarly direct, and accordant with the natural and known course of criminal conduct. Hence it has become a rule of evidence, that the possession of property which has been recently stolen, raises such a presumption of guilt against the possessor, as to throw on him the burden of showing how he came by it, or that he came honestly by it; and, in the event of his failing to do so, to warrant the final inference or conclusive presumption of his being the real offender. (a) The presumption arising from the possession of the property, in such cases, furnishes, indeed, the most common and simple instance of the application and effect of presumptive evidence, in the whole range of criminal law. (b) The presumption itself is strictly a natural one, (c) although, from its being fully recognized by the law, it has sometimes been regarded as a presumption of law. (d) "Its foundation," as an able writer has justly observed, "is the obvious consideration that, if the possession has been lawfully acquired, the party would be able, at least shortly after its acquisition, to give an account of the manner in which such possession was obtained." (e) It is reasonable, also, that he to whom *alone* the physical evidence of the case distinctly points, should, if in fact free from any guilty connection with it,

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(a) Best on Pres § 228. Wills, Circ. Evid. 47. 2 East's P. C. 656. 1 Stark. Evid. 488. 2 *Id.* 840. 8 *Id.* 1245. 1 Phill. Evid. 447. 8 *Id.* (Cowen & Hill's notes, Van Cott's ed.) 477. Roscoe's Crim. Evid. 18. 1 Greenl. Evid. § 34, p. 44, and the authorities cited in note (1) *ibid.* 2 Russell on Crimes, 128. *Pennsylvania v. Myers*, Addison, 820. *State v. Jenkins*, 2 Tyler, (Vt.) 377. *State v. Brewster*, 7 Vermont, 122. *State v. Weston*, 9 Conn. 527, 529. *The People v. Preston*, 1 Wheeler's Crim. Cases, 41. *Johnson, J.* in *Davis v. The People*, 1 Parker's Crim. Rep. 447, 450. *State v. Merrick*, 19 Maine, (1 Appleton,) 398. *Hughes v. The State*, 8 Humphrey, 75. And see the note to *Cockin's case*, 2 Lewin's Cr. Cas. 285.

(b) Roscoe's Crim. Evid. 18.

(c) 3 Stark. Evid. 1245. Best on Pres. § 85. Wills, Circ. Evid. 47.

(d) Best on Pres. § 37, note (f). See *ante*, p. 67, note (b). And see the language of the court, in *The State v. Williams*, 9 Iredell's Law, 140.

(e) Wills, Circ. Evid. 47. See 2 Stark. Evid. 840.

contribute, and willingly, all the knowledge he has, in order to throw light on the transaction, and aid in detecting the real offender. Hence, in the language of the writer just quoted, "his unwillingness or inability to afford such explanation is justly regarded as amounting to strong self-condemnatory evidence." (a)

But, as was shown in the preceding section, it is not *every* kind of possession, which is sufficient to put the party on his defence ; but, in order to raise the requisite presumption against him, it must be shown to be both *recent* and *exclusive*.

1. The possession must be *recent*. (b) If immediately following the commission of the crime, or on the same day with its commission, the presumption occurs in the strongest form. (c) But if an interval elapse between the loss and the finding, the presumption becomes weakened ; (d) as it lets in the possibility and consequent supposition that the property, during such interval, may have been disposed of by the thief, and innocently acquired by the possessor ; or may even have passed through several hands before reaching the latter. (e) It obviously tends also, to increase the difficulty, on the part of the possessor, of explaining how he came by it, and to render the identity of the property itself more or less doubtful. (f) After the lapse of a considerable time, before a possession is shown in the accused, if no other unfavorable circumstance appear against him, the pre-

(a) Wills, Circ. Evid. 47, 48.

(b) Best on Pres. § 228. Wills, Circ. Evid. 48. *The State v. Floyd*, 15 Missouri, 349. *The State v. Wolff*, *Id.* 168.

(c) "If a horse be stolen from A," says *Hale*, "and, the same day, B. be found upon him, it is a strong presumption that B. stole him." 2 *Hale's P. C.* 289. Yet, he adds that he remembered a case before a very learned and wary judge, in which an innocent person, found in such a situation, was executed for a theft committed by another. See *ante*, p. 212.

(d) Wills, Circ. Evid. 48. *Rex v. Cockin*, 2 *Lewin's Cr. Cas.* 235.

(e) 2 *Stark. Evid.* 840.

(f) 2 *East's P. C.* 656. See the note to *Cockin's* case, 2 *Lewin's Cr. Cas.* 235.

sumption of guilt will not be raised. (a) But what shall be considered a *recent* possession, cannot be absolutely determined by any rule, but must depend not only upon the mere lapse of time, but upon the nature of the articles stolen, and the considerations whether they are of a description likely to pass rapidly from hand to hand, or such as the party might, from his situation in life, or the nature of his vocation, become innocently possessed of. (b) "A poor man, for instance," observes Mr. *Best*, "might fairly be called on to account for the possession of articles of plate, jewels, or rare and curious books, after a much longer lapse of time than if the property found on him consisted of clothes, articles of food, or tools proper for his station or trade, &c." (c) In the earliest reported English case on this subject, (d) *Bayley*, J. directed an acquittal, because the only evidence against the prisoner was that the stolen goods were not found in his possession, until a lapse of *sixteen months* from the time of the loss. In the case of *Rex v. Cruttenden*, (e) where a shovel which had been stolen was found, *six months* after the theft, in the house of the prisoner, who was not then at home, *Gurney*, B. held that, on this evidence alone, the prisoner ought not to be called on for his defence. And in the case of *Rex v. Adams*, (f), where the prisoner was indicted for stealing a saw and a mattock, and the whole evidence was that they were found in his possession, *three months* after they were missed, *Parke*, B. directed an acquittal. On the other hand, in the case of *Rex v. Dewhirst*, (g) where seventy sheep were

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(a) Anon. 2 Carr. & P. 459. *The State v. Williams*, 9 Iredell's Law, 140.

(b) Best on Pres. § 228. 2 Russell on Crimes, 124. *Rex v. Partridge*, 7 Carr. & P. 551.

(c) Best on Pres. *ubi supra*.

(d) Anon. 2 Carr. & P. 459.

(e) Kent Spring Assizes, 5 Vict. MS. 6 Jurist, 267. Best on Pres. § 228.

(f) 8 Carr. & P. 600.

(g) 2 Stark. Evid 614; (3d. ed) cited in Best on Pres. § 228.

put on a common, on the 18th of June, but not missed till November, and the prisoner was proved to have been in possession of four of them in October, and of nineteen more on the 23d November, *Bayley*, J. allowed evidence of the possession in both cases to be given. And in the case of *Rex v. Partridge*, (a) where the prisoner was indicted for stealing two ends of woollen cloth (that is, pieces of cloth consisting of about twenty yards each,) in an unfinished state, which, at the expiration of *two months* after they were missed, were found in his possession, on its being objected that too long a time had elapsed, *Patteson*, J. overruled the objection, and the prisoner was convicted. In the most recent English case on the subject, the prisoner was indicted for stealing three sheets, and the only evidence against him was that they were found on his bed *three* calendar *months* after the theft. On this, it was objected by his counsel, on the authority of *Rex v. Adams*, that the prisoner ought not to be called on for his defence; but *Wightman*, J. said that it seemed to him impossible to lay down any definite rule as to the precise time which was too great to call on a prisoner to give an account of the possession of stolen property; and that, although the evidence in the actual case was very slight, it must be left to the jury to consider what weight they would attach to it. The prisoner was acquitted. (b)

In a case in North Carolina, the facts that a horse was stolen on the 10th and found on the 16th of the same month, at sixty miles distance from the place of taking, in the prisoner's possession, were held to raise the requisite presumption against him. (c) And in a case in South Carolina, an interval of *two months* was held not to rebut the presumption of guilt. (d) But, in a recent case in Iowa, the fact

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(a) 7 Carr. & P. 551.

(b) *Regina v. Hewlett*, Salop Spring Assizes, 1848; 2 Russell on Crimes, (by Greaves,) 728. See Best on Pres § 228, where all the cases are cited.

(c) *State v. Adams*, 1 Haywood, 468. Acc. *State v. Floyd*, 15 Missouri, 349.

(d) *State v. Bennet*, 2 Const. R. 692. (3 Brevard, 514.)

that a portion of the chattels stolen were found upon the premises of the accused *eighteen months* after they were stolen, unaccompanied by other suspicious circumstances, was held not to be *primâ facie* evidence that the accused was guilty of the larceny. (a)

Where a considerable interval has elapsed between the loss and the finding of the property, other circumstances, in addition to the fact of possession, must be shown, in order to raise the requisite presumption against the possessor. (b) Among these are, proximity on his part to the time and place of the taking; his conduct or language after the larceny; and his secreting the property in order to avoid discovery. These will be more fully considered in the sequel.

In order to render evidence of the possession of stolen property admissible, it is not necessary that the discovery should take place before the apprehension of the prisoner. (c)

2. The possession must be *exclusive*. (d) A finding of stolen property in the prisoner's house or apartment, is equally competent in evidence against him, as a finding upon his person. (e) But the house or room must be proved to be in his exclusive occupation. If the property were found in a locked-up room or box of which he kept the key, it would be a fair ground for calling on him for his defence. But if it were only found lying in a house or room in which he lived jointly with others equally capable of having committed the theft, it is clear that no definite presumption of

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(a) *Warren v. The State*, 1 Iowa, (Greene,) 106.

(b) 8 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) 480.

(c) Anon. cited by Lord *Ellenborough*, in *Watson's case*, 2 Stark. N. P. 139. It was said by *Abbot, J.* in this case, that an assize had scarcely ever occurred, where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house, after his apprehension.

(d) Best on Pres. § 229. *Johnson, J.* in *Davis v. The People*, 1 Parker's Crim. R. 447, 451.

(e) 1 Phill. Evid. 447. 3 *Id.* 480, (Cowen & Hill's notes, Van Cott's ed.)

his guilt could be made. (a) Where parties stand in the relation of husband and wife, however, possession by the wife, on the husband's premises, is considered as that of the husband. (b) If stolen goods are found in a place where the prisoner has been seen, or near where he has been seen, it will sometimes serve to raise a presumption of guilt against him. (c)

There is no doubt that the mere fact of possession of stolen property, which has been satisfactorily identified, if both recent and exclusive, is, in itself, sufficient to raise a presumption strong enough, if unrebutted, to warrant the conviction of the possessor. (d) But such presumption may be materially strengthened by accompanying circumstances, the most prominent of which will now be considered.

1. *Proximity* of the person of the accused to the place from which the property was stolen, about the time of the larceny, is a strong corroborative circumstance of the concomitant class. (e)

2. The *concealment* of the stolen property is a strong cir-

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(a) Best on Pres. § 229. 2 Stark. Evid. 840, note (z). Roscoe's Crim. Evid. 19. Johnson, J, in *Davis v. The People*, 1 Parker's Crim. R. 451, 452. It is, however, remarked by Mr. Greaves, in regard to evidence of a finding of goods in a house where there are other inmates, that "learned judges have generally considered such evidence as sufficient to call upon the occupier of the house to account for the possession; on the ground that the house being in his occupation, the property was found in his possession; and there seems good reason for this course, because, as master of the house, he must be presumed to have the control over it, and to permit nothing to come into it without his sanction; at the same time, it is for the jury, under all the circumstances, to say whether the master stole the property or any of the other inmates of the house." Greaves' note (g) to 2 Russell on Crimes, 124. As to the effect of finding goods in an open shop, (as a blacksmith's shop,) see *Lamb's case*, in Saratoga County, New York, 3 Phill. Evid. 481, (Cowen & Hill's notes, Van Cott's ed.)

(b) *Regina v. Mansfield*, 1 Carr. & M. 142. Wills, Circ. Evid. 50.

(c) Lord Ellenborough, in *Rex v. Watson*, 2 Stark. N. P. 189. See *Regina v. Beards*, Stafford Summer Assizes, 1844, Wills, Circ. Evid. 108.

(d) Best on Pres. § 228. But see *Id.* 280.

(e) 2 East's P. C. 656. 1 Phill. Evid. 447.



cumstance against the possessor. (*a*) Under this head may be classed acts intended to destroy the identity of the property; such as the erasure of marks or names upon it; changing the form, as by breaking up, or melting down plate; (*b*) changing the color, as by dyeing an article of clothing; (*c*) and the like.

3. The *conduct* and *language* of the accused, after the larceny, is another material circumstance. (*d*) Among facts of this kind may be enumerated, his unwillingness to meet the charge against him, (*e*) his denial of the fact of possession, where it is subsequently proved, his refusing to give any account of the possession, (*f*) his making false or improbable or inconsistent statements in endeavoring to account for the possession, (*g*) and his having sold or offered to sell the property especially at an inferior price. (*h*)

The coincidence, in number and kind, of the articles stolen with those found in the possession of the accused, increases also the probability of guilt; the possession of one, out of a large number stolen, being more easily attributable to accident or forgery, than the possession of all. (*i*)

But, in order to give to the fact of possession its full criminative effect, in raising a presumption of guilt against the possessor, it is always indispensable that the property

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(*a*) 2 East's P. C. 657. 1 Phill. Evid. 447. *The People v. Smith*, 1 Wheeler's Crim. Cases, 131.

(*b*) *Rex v. Smith, Varnham & Timms*, Wills, Circ. Evid. 289, 240.

(*c*) *Drayne's case*, 5 London Legal Observer, 123.

(*d*) 2 East's P. C. 656.

(*e*) 2 Stark. Evid. 841.

(*f*) *Commonwealth v. Millard*, 1 Mass. 6. *Johnson, J. in Davis v. The People*, 1 Parker's Crim. R. 447, 451, 452.

(*g*) 2 Stark. Evid. 841. *Rex v. Diggles*, Wills, Circ. Evid. 53. *State v. Adams*, 1 Haywood, 464. *Riley's case*, 1 City Hall Recorder, 23. *Armstead's case*, *Id.* 174. *Johnson, J. in Davis v. The People*, *ubi supra*.

(*h*) *Rex v. Diggles*, *ubi supra*. *Rex v. Howe*, Wills, Circ. Evid. 286. *Rex v. Smith, Varnham and Timms*, *Id.* 240. *Pennsylvania v. Myers*, Addison, 320, 321. *Armstead's case*. 1 City Hall Recorder, 174.

(*i*) Best on Pres § 228. Wills, Circ. Evid. 50.

itself be satisfactorily *identified*, in regard to which, the following observations will, for the present, suffice. (*a*)

Where all that can be proved concerning property found in the possession of a supposed thief, is that it is *of the same kind* as that which has been lost, this will not, in general, be deemed sufficient evidence of its having been feloniously obtained, and some proof of identity will be required. But where the fact is very recent, and the property consists of articles the identity of which is, from their nature, not capable of strict proof, the conclusion may be drawn that the property, being of the same kind, is, in fact, *the same*; unless the prisoner can prove the contrary. (*b*) Thus, if a man be found coming out of another's barn, and, upon his being searched, corn [or grain] be found upon him, of the same kind as that in the barn, the fact is pregnant evidence of guilt; (*c*) and cases have frequently occurred where persons employed in carrying sugar or other articles from ships and wharves, have been convicted of larceny upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places; although the identity of the property, as belonging to such and such persons, could no otherwise be proved. (*d*)

Identity may be directly proved either by marks, or by the witness' confident general knowledge of the particular goods. (*e*) A witness may safely be relied on, as to his acquaintance with a specific article of familiar use, (as his *own clothes*,) though he can give no reason why he knows them to be the same, or though he give, as he often may, a false or absurd reason for his knowledge. (*f*)

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(*a*) The subject of identification will be particularly considered in the next chapter.

(*b*) 2 East's P. C. 657, c. 16, § 98. 2 Stark. Evid. 841.

(*c*) 2 East's P. C. *ubi supra*.

(*d*) 2 Russell on Crimes, 125. *Rex v. McKechnie and Tolmie*, Alison's Princ. 822. Wills, Circ. Evid. 55, 108.

(*e*) 3 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) note 298, p. 481.

(*f*) 2 Evans' Pothier on Obligation, 218, 214, (Phil. 1858.)

In order to raise the requisite presumption of guilt, it is not necessary that the *whole* of the stolen property should be found in the party's possession. The jury may infer the stealing of the whole from the possession of a part. (a) The probability of guilt, however, is increased in proportion as the number found is large and coincident with the number stolen. (b)

The effect of the presumption of guilt, arising from the fact of the possession of stolen property, where it has been duly raised against the possessor, by proof of such facts as have been enumerated, is (as already observed,) to throw upon him the burden of accounting for such possession; or, in other words, of explaining how the property came to be where it was found. The particular grounds of these exculpatory explanations belong to the head of exculpatory evidence, and, as such, will be fully considered in another place. A few general remarks, only, will be added, under the present head.

The mere statement of the party charged, though unsupported by evidence, may, under certain circumstances, have the effect of materially weakening the force of the presumption, as it stands against him; and, sometimes, to such a degree as to throw the burden of proof back upon the prosecutor. (c) As if the statement be probable or natural in itself, and maintained, without material variation, on different occasions; and the character, station and connections of the party are such as to suggest no reason for doubting its truth, and no unfavorable circumstances are shown. (d) Indeed, it has been laid down in some cases, that, where the bare fact of possession is all that is proved against the ac-

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(a) *State v. Jenkins*, 1 Tyler, 377, 379. *Collins' case*, 4 City Hall Recorder, 189. And see *Commonwealth v. Millard*, 1 Mass. 6.

(b) Best on Pres. § 228. Greaves' note (ff) to 2 Russell on Crimes, 124.

(c) 1 Stark. Evid. 512, 513. Wills, Circ. Evid. 48. *Regina v. Smith*, 2 C. & K. 207, quoted *ibid*.

(d) See the note to *Cockin's case*, 2 Lewin's C. C. 285, 287.

cused, mere evidence of good character on his part will suffice as a defence. (a) If, on the other hand, the statement offered in explanation of the fact of possession, be unreasonable or improbable, on the face of it, the accused will be held to the actual proof of its truth, in order to throw off the presumption. (b) And if the statement be obviously false or impossible on its face, or if various statements are made which are manifestly and materially inconsistent with each other, the presumption, instead of being weakened, will be only the more firmly fixed upon him. (c)

The fact of the possession of stolen property is often a material circumstance in the proof of other crimes. In the case of *Rex v. Diggles*, (d) it had great weight in convicting the accused of the murder of two persons. In the case of *Rex v. Rickmans*, (e) it had a similar effect in convicting the accused of arson. In regard to its effect in proving the crime of burglary, there have been the following decisions. In the case of *Commonwealth v. Millard*, (f) where the indictment was for shop-breaking and stealing goods, and a part of the goods stolen was found in the possession of the prisoner, *Sedgwick*, J. in his charge to the jury, stated the rule to be, that the proof of the possession was presumptive evidence, not only that he stole the whole of the articles taken from the shop, but also, of his breaking and entering, as alleged in the indictment. In that case, however, the prisoner refused to give any account of how he came by the goods. In the case of *The People v.*

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(a) 8 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) note 298, p. 482. See *The People v. Turrell*, 1 Wheeler's Crim. Cases, 84. *The People v. Preston*, *Id.* 41. *Weston*, C. J. in *State v. Merrick*, 19 Maine, (1 Appleton,) 398, 401.

(b) Wills, *Crim. Evid.* 48.

(c) *Id.* 58.

(d) *Id. ibid.*

(e) 2 East's P. C. 1085.

(f) 1 Mass 6. Approved in 8 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) note, 307, p. 596. Commented on, by *Johnson*, J. in *Davis v. The People*, 1 Parker's Crim. R. 447, 450, 451.

*Frazier*, (a) which was an indictment for burglary and larceny, it was held by the Recorder, that possession of the goods was presumptive evidence of the larceny, but not of the burglary. In the recent case of *Davis v. The People*, (b) the question came before the Supreme Court of New York, on a writ of error, and the rule was laid down in the following terms :—that, where a burglary is connected with a larceny, *mere possession* of the stolen goods, without any other evidence of guilt, is not to be regarded as presumptive evidence of the burglary. But where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter, found in the actual and exclusive possession of a person who gives a false account, or refuses to give any account of the manner in which he came to the possession, proof of such possession and guilty conduct is presumptive evidence, not only that he stole the goods, but that he made use of the means by which access to them was obtained.

The recent possession of stolen property may sometimes be referable, not to the crime of theft, but to another, though kindred offence,—that of having *received* the property with a guilty *knowledge* of its having been stolen. (c) And, in the opinion of an able writer, there can be little doubt that persons have frequently been convicted and punished for the former offence, whose guilt consisted in the latter: a consequence which he attributes to the circumstance that real evidence, (or evidence derived from physical facts,) while truly indicative of guilt in general, may be fallacious as to the species and quality of the crime. (d) In order to avoid the chances of such mistakes, (e) it was suggested by the same writer, that counts for larceny should

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(a) 2 Wheeler's Crim. Cas. 85. Commented on by Johnson, J. *ubi supra*.

(b) 1 Parker's Crim. Rep. 447, 451.

(c) Wills, Circ. Evid. 55.

(d) Best on Pres. § 227.

(e) See, on this point, the remarks of Mr. Wills, Circ. Evid. 55.

be joined with counts for receiving the goods, in the same indictment; (a) and this practice has since become established both in England and in the United States. (b)

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## SECTION XIX.

### *Sudden change of Life or Circumstances.*

In the last section, the effect of the recent possession of the fruits of crime was considered so far as such possession was a *visible* one, capable of direct proof, and confirmed by actual identification of the objects found in possession. But such possession may also sometimes be *inferred* from observed circumstances. In most cases, the fruits of crime themselves are so well concealed from view by the perpetrator, as to furnish no immediate evidence against him. There is nothing visible in his possession, which can be directly traced to or connected with the offence. But they sometimes betray themselves by their *consequences*, as by a sudden and material *change in life* or circumstances, indicating, beyond question, the recent receipt of money or property from some quarter. Where a person, previously known to be poor, is found, shortly after a robbery, larceny (c) or murder, in the possession of considerable wealth, it is always a circumstance of suspicion; and, when corroborated

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(a) Best on Pres. § 227, note (g).

(b) See Wharton's American Criminal Law, 205, 206, (ed. 1855,) and the cases cited in the notes, *ibid*.

(c) On an indictment for stealing bank-bills, proof that the prisoner was destitute of money before the larceny, was allowed, among other circumstances, to be submitted to the jury. *Commonwealth v. Montgomery*, 11 Metcalf, 534.

by others, of material weight in connecting the crime with its perpetrator. It is, generally, one of the earliest indicatory circumstances that are discovered, and, in several recorded cases, has had the effect of first attracting attention in the right direction, and affording the first available clue to the discovery of the offender.

In the case of *Moses Drayne*, (a) A. D. 1654, where a traveller had been murdered at an inn, for a sum of money which he had with him, and had deposited with the inn-keeper for safe keeping, it appeared in evidence that the ostler of the inn, who was at the time worth nothing of his own, shortly after the murder, lent sixty pounds to a woman who kept an inn in the same town. It appeared, also, that the circumstances of the inn-keeper himself had suddenly improved. For, before the murder he was so poor that his landlord would not trust him for a quarter's rent, but would make him pay every six weeks; and he could not be trusted for malt, but was forced to pay for one barrel under another. But shortly after, he bought a ruined malt-house, and new-built it; and usually laid out forty pounds in a day to buy barley. There was also observed, upon a sudden, a great change in his daughters' condition, both as to their clothes and otherwise; and if there was but a hood bought for one of the daughters, there was a piece of gold changed; and they were observed to have gold in great plenty.

In the French case of *M. D'Anglade*, (b) A. D. 1687, it was proved that both the real criminals had suddenly, from a state of the lowest indigence, appeared to be in affluent circumstances; dressing in expensive clothing, and showing large sums of money; and that one of them had purchased an estate for which he had paid between nine and ten thousand livres.

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(a) 5 London Legal Observer, 123, 124, 125

(b) *Id.* 231. 233.

In the English case of *Rex v. Burdock*, (a) a similar change in the prisoner's habits and mode of life was the circumstance which first led to suspicion and the subsequent discovery of the crime. And in the late New Jersey case of *Peter Robinson*, (b) the same circumstance was instrumental in leading to a similar result.

It is to be observed, however, that this circumstance always requires to be corroborated by others; and, standing alone, is not considered a sufficient ground for putting a party on his defence. (c) It presents, in itself, merely a coincidence which, however natural or reasonable it may appear on the supposition of the guilt of the party indicated, is nevertheless capable of more or less satisfactory solution and explanation, on suppositions entirely consistent with his innocence. (d)

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## SECTION XX.

### *Conduct, Demeanor and Language after the commission of a Crime.*

(The principal criminative circumstances usually classed under this head, are, the alarm and confusion of a suspected person in prospect of his discovery;) his concealment and

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(a) Best on Pres. § 196.

(b) *The State v. Robinson*, Middlesex, (N. J.) Oyer & Terminer, March, 1841. Pamphlet Report, 11, 12, 18, 19, 22.

(c) Best on Pres. § 288. *Id* § 33.

(d) So, in the civil law, where a guardian who originally had no estate of his own, became opulent during the continuance of his guardianship, this fact, standing alone, was deemed insufficient to raise even a *prima facie* case of dishonesty against him. Voet ad Pand. lib. 22, tit. 3, n. 14. *Cod.* 5, 51, 10. Best on Pres. § 33.



flight ; his agitation and other conduct on arrest ; his silence under accusation ; his giving false, evasive or inconsistent replies to inquiries made of him ; his unsatisfactory explanations of suspicious appearances ; and his statements of a confessional character, whether judicial or otherwise.

But before proceeding to the consideration of these, it will be proper to take notice of some minor miscellaneous circumstances of conduct and language, usually of prior occurrence, and sometimes found to be of considerable importance as *indicia* of previous special criminal agency.

1. *Giving various, false and inconsistent accounts of the cause of the death of a deceased person.* In *Donellan's* case, the accused represented to some persons, that the deceased had died of a cold occasioned by wetting his feet, (a) although, in fact, his feet had not been wet ; (b) to others, that the cause of death was the rupture of a blood-vessel ; (c) and to others, that it was a venereal complaint. (d) He finally admitted that the real cause was poison, but laid the guilt of administering it upon others, including in the charge the deceased himself and his own mother. (e) In the recent case of *Regina v. Tawell*, the prisoner falsely alleged that the deceased had poisoned herself. (f)

2. *Giving improbable or contradictory accounts of the manner of the death, where the accused claims to have witnessed it.* In the case of *The State v. Cicely*, (g) the prisoner at one time said that the murder was committed by five robbers, and that she was awake when they entered the house, and saw them enter. At another time, she said she was asleep, and did not see them enter.

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(a) *Rex v. Donellan*, Gurney's Report, 1781. Celebrated Trials, 126. (Phil. 1885.)

(b) *Id.* 146.

(c) *Id.* 129.

(d) *Id.* 148.

(e) *Id.* 149.

(f) Aylesbury Spring Assizes, 1845; Wills, Circ. Ev. 198, 290.

(g) 13 Smedes & Marshall, 206, 216.

3. *Objecting to have a dead body examined*, in order to ascertain the cause of death. It is not uncommon, in cases of supposed poisoning, that great repugnance is manifested by the suspected parties, to having the body submitted to anatomical examination. "The expression of such repugnance," observes an able writer, "is a fact to be taken into consideration, like all other facts, but it by no means follows that it is to be considered as a mark of conscious guilt. It is well known that many persons have a great prejudice against the anatomical examination of their near connections: much, therefore, depends upon the situation in life, of the parties, and whether they have been nearly related." (a) The mere fact of relationship, however, does not necessarily serve to destroy the criminative tendency of such objections. (b) And it has been shown, by cases like *Donellan's*, that a person may express all willingness to have such examination take place, and yet, at the same time, be engaged in measures to prevent it, or to delay it long enough to frustrate its object. (c)

4. *Refusing to look at the body of a murdered person.* (d) Observation has shown that there is often a great repugnance, on the part of murderers, to look upon the bodies of their victims. (e) In *Mrs. Spooner's* case, (f) where the female criminal had procured the murder of her husband, and the concealment of his body in the well, she could not

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(a) Wills, Circ. Evid. 75.

(b) In *Philip Stundsfeld's* case, the criminal not only objected to having his father's body examined, but persisted in having it interred at once. 11 State Trials, 1402. In this case, the deceased had been strangled, and then thrown into the water.

(c) *Rex v. Donellan*, Celebrated Trials, 151, (Phil. 1835.) *Ante*, p. 404.

(d) This was a circumstance relied on in the case of *James Stewart*, although it was explained by the accused. 19 State Trials, 156.

(e) As to touching the corpse, see *post*. p. 478.

(f) 2 Chandler's American Crim. Trials, 13. So, in the case of *Nairn and Ogilvie*, the female criminal refused to look at her husband in his last moments, and even to go into the room where he lay. 19 State Trials, 1284.

be persuaded to look at it for a long time. (*a*) In some cases, this feeling has been carried to the length of refusing to remain in the same house with the body. In *Peter Robinson's* case, (*b*) where the deceased had been secretly killed in the prisoner's own house, and buried under the basement floor, the prisoner did not sleep in the house a single night after the deceased disappeared: and said he would not sleep nor live there, unless some one moved in there with him. The reason he gave for this repugnance was, that his children had died there suddenly. (*c*)

5. Saying of a person who had suddenly disappeared, that he would *never be seen again*, or would never give trouble again, or expressions of equivalent import. (*d*) In *Corder's* case, (*e*) the accused said of a female whom he had murdered, and who had had illegitimate children, that "she would have no more children." In a late English case in the Central Criminal Court, similar expressions were made use of. (*f*)

Among circumstances of conduct and language, occurring during the progress of actual investigation, may be enumerated the following.

6. *Confusion* manifested at a *simple inquiry*. In *Drayne's* case, (*g*) the wife of a person who had suddenly disappeared, and had long been missing, having, in the course of her inquiries after him, found the ostler of the inn at which he

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(*a*) After the coroner's inquest had been taken, however, she, at the particular request of a witness, went to the body, and put her hand on his forehead, and said, "poor little man." 2 Chandler's Trials, 14.

(*b*) *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841. Pamphlet Report, 17.

(*c*) *Id. ibid.*

(*d*) In *Carawan's* case, an expression of this kind had been used by the criminal, before the commission of the crime. *The State v. Carawan*, Pamphlet Report, 50, 65.

(*e*) *Rex v. Corder*, Celebrated Trials, 218, (Phil. 1835.)

(*f*) Case in Central Criminal Court, May, 1842; Wills, Circ. Evid. 166, 167

(*g*) 5 London Legal Observer, 123, 124.

had put up, the night before his disappearance, asked him to describe the clothes of the person who left his horse with him on that occasion. The ostler having done so, she asked him what hat he wore. He replied, "a black one." "Nay," said she, "my husband's was a grey one." At which words, he changed color several times, and never looked up in her face afterwards. The ostler had, in fact, taken the hat of the murdered man, and had it *dyed* from grey to black.

7. *Casual observations* leading to important results. In the case of *Eugene Aram*, who was tried in the year 1759, for the murder of *Daniel Clark* thirteen years before, an apparently slight circumstance in the conduct of *Houseman*, his accomplice, led to *Aram's* conviction and execution. A skeleton, thought to be *Clark's*, had been accidentally disinterred near *Knaresborough*, and it having been determined to hold a coroner's inquest over it, *Houseman* was summoned to attend the inquest. The symptoms of uneasiness which he betrayed on this occasion, attracted attention, and having taken up one of the bones, at the request of the coroner, he, in his confusion, dropped the unguarded expression,—“This is no more *Daniel Clark's* bone than it is mine.” (a) From this it was reasonably concluded, that if he was so certain that the bones before him were *not* those of *Clark*, he could give some account of him; and he was accordingly pressed with the observation. After various evasive accounts, he made, at length, a full confession of the crime; and, upon search, pursuant to his statement, the skeleton of *Clark* was found in St. Robert's cave, buried precisely as he had described it. (b)

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(a) It is worthy of remark, that an expression almost identical with this, escaped from the lips of the prisoner in the case of *Commonwealth v. Webster*, after he had been brought in view of the remains of the deceased:—“That is no more Dr. *Parkman's* body than it is mine.” Bemis' Report, 194. The difference was that in *Houseman's* case, the expression was founded in truth; but in *Webster's* it was thoroughly false.

(b) See the case, as referred to by Mr. *Wills*, *Circ. Evid.* 68.

8. *Leading inquiry away* from certain localities. In the case of *Commonwealth v. Webster*, (a) in the course of a search made by the police officers through the premises occupied by the accused, they came to the door of a private privy; and on one of them inquiring what place it was, and being told, the accused, who was in the company, immediately went and unbolted a door on the *opposite* side of the laboratory, and leading from it to a front store-room, and said,—“Gentlemen, here is another room;” and then they all passed out. Portions of the remains of the body of which the officers were in search, were at that moment lying in the privy-vault.

9. *Objecting to particular modes of search*, or to search in particular places. In *Peter Robinson's* case, (b) on its being proposed to have the front basement floor of the prisoner's house taken up, for the purpose of looking under it, the prisoner strongly objected, alleging the very absurd reason that, if the floor should be taken up, the house would fall down. The body of the person sought for was then lying buried under that floor.

10. *Resisting examination* of the person, or the use of the person, to verify physical facts. In *Cicely's* case, (c) on an attempt being made to compare the prisoner's feet with certain foot-prints observed near the house where the murder had been committed, she resisted, and had to be compelled by force to put her feet into the tracks.

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(a) Bemis' Report, 110.

(b) *The State v. Robinson*, Pamphlet Report, 14, 28.

(c) *The State v. Cicely*, a slave, 13 Smedes & Marshall, 205, 206.

## SECTION XXI.

*Alarm and Confusion in view of Discovery.*

That the legal consequences of crime,—the loss of character, liberty and life, attached to its commission,—are rarely contemplated in their true light before-hand, has been remarked under a former head. It is *after* the criminal act, (especially if of a high grade) has been done, and when the author of it (if perchance touched with a feeling of penitence) finds that it cannot possibly be undone, and that his connection with the facts of the transaction is irrevocably fixed, that the impending consequences flash upon his mind with all their force. They are now not contemplated as ulterior and remote contingencies and possibilities, but seen close at hand, with no seducing or absorbing objects to intercept the view; and, thus seen, they have power to agitate the natures of most men thoroughly, and to occupy their thoughts exclusively. To avoid these consequences, by the concealment of either the crime, or the criminal, if not of both, is now a sort of natural impulse, which, observation shows, is almost universally obeyed. The almost incredible amount of labor sometimes laid out in attempts to conceal a crime, by destroying not only all the physical evidences of the offence itself, but also every link which can possibly connect it with the individual perpetrator, and the various expedients resorted to, in order to render such labor effectual, have already been dwelt upon.

But even in cases where, apparently, the most effectual precautions for concealment have been taken, the *idea* of discovery may be said to haunt the mind, and the *fear* of discovery not unfrequently to agitate it, in spite of all determination to assume an exterior of calmness or indifference. Hence, where a case of suspected crime has become

the subject of judicial investigation, and the general fact of the commission of a crime has been ascertained, and particularly where vigorous measures have been set on foot to trace out the individual perpetrator; the idea—now converted into the prospect—of discovery, and that becoming a more and more probable event, as fact after fact is brought to light, naturally, and almost necessarily, fills the mind with alarm; particularly where the criminal finds *his own person* drawn within the sphere of the investigation. Emotion and agitation exhibited under such circumstances, especially where no charge of guilt has yet been made or insinuated, are regarded, and justly, among the most convincing evidences of criminal agency that can be submitted to a human tribunal.

The Scotch case of *Rex v. Richardson*, (a) already given at length at the close of the first part of this work, (b) may be here referred to, as furnishing an apt illustration of the remarks just made. In that case, a series of foot-prints having been observed on the ground, leading from the cottage in which the murder had been committed, the natural and very obvious test of *comparison* suggested itself, and an opportunity was soon found of applying it with effect. Suspicion had not, at the time, rested on any particular individual as the murderer, but while the shoes of *Richardson*, among those of a number of other persons attending the funeral of the deceased, were in process of being measured, it was observed by the person who sat next to him, that he trembled much and seemed a good deal agitated. The result of the measurement and comparison was, that his shoes were found to correspond with the impressions in every respect, including the minutest peculiarities. Here was a moral coincidence, immediately and thoroughly sustained by a physical one; the two harmonizing completely,

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(a) Burnett's Crim. Law of Scotland, p. 524, *et seq.*

(b) *Ante*, pp. 243—247.

as well as according with numerous other circumstances in that highly instructive case, in their criminative effect upon the accused. (*a*)

It is true, nevertheless, that criminals do not *uniformly* betray alarm or uneasiness in view of the possibility or even the probability of discovery, but often maintain an exterior of calmness, which is sometimes persevered in under still more trying circumstances. (*b*) This may arise from superior strength of nerve, or greater power of self-command, as well as from the conviction that to exhibit emotion at this stage would stimulate inquiry, and tend to precipitate the fact of discovery itself, and thus bring about the very result dreaded. And yet, again, it will happen that, in the struggle to counterfeit an indifference not really felt, the part is over-acted, and the manner becomes visibly forced and unnatural; while, at times, in spite of the utmost vigilance, an occasional symptom of uneasiness will escape, and become the subject of remark and remembrance to others. The great American case of *Commonwealth v. Webster* is full of the most painfully instructive facts on this subject. (*c*)

Again, there is a class of cases, (though comparatively a very limited one,) in which the criminal, instead of avoiding with an instinctive aversion, all appearances and associations tending to connect his own person with a crime known or believed to have been committed, adopts the singular and audacious policy of openly assuming such connection, and proclaiming it with his own lips; qualifying it, however, so far by his manner, as to induce those who may hear him to attribute it to idle bravado or peculiarity of character, and to disregard it accordingly. This may be illustrated by the New Jersey case of *Peter Robinson*. Some days after the

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(*a*) The behaviour of *Houseman*, while attending an inquest over remains which were not (as he knew,) those of the murdered *Clark*, may also be referred to. See *ante*, p. 468.

(*b*) See *post*, Section XXVIII.

(*c*) See Bemis' Report of the trial, pp. 167, 168, 177.



disappearance of Mr. *Suydam*, the deceased, (whose body was afterwards found under the basement floor of *Robinson's* house,) the prisoner showed a gold watch to a friend whom he met (afterwards a witness in the cause,) and told him "it was Mr. *Suydam's* watch;" that "it took him to knock Mr. *Suydam* over, and he had some of Mr. *Suydam's* clothes on then." (a) These remarks presented a strange mixture of truth and falsehood; for the watch was not Mr. S.'s, but one obtained from a watchmaker, in exchange for it. It appeared that *Robinson* was in the habit of making singular and foolish or nonsensical remarks in his general conversation; and he doubtless relied upon that circumstance to produce upon the witness the impression he desired; and such impression *was, in fact, produced*. For the witness swore on the trial, that, from the prisoner's manner, he thought that what he said was *all in jest*. But this was not all. For, only two days before the body of the missing man was found under the *front* basement-floor of *Robinson's* house, he remarked to a carpenter, (also a witness in the cause,) who found him, with a hoe, dragging the earth in the *back* basement, as if he had been getting out sand for the masons,—“here's where I was going to poke *Suydam* under;” adding that he had not time to do it. (a) The witness testified that “he said all this as a joke; he was looking at me and laughing.” (b) The cool audacity of such conduct, on the very verge of discovery, is perhaps without a parallel on record.

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(a) Pamphlet Report, 18.

(b) *Id.* 22.

(c) *Id.* 28.

## SECTION XXII.

*Concealment and Flight.*

Perhaps no proposition is more easily deducible from the constitution of human nature and the structure of the human mind, or more constantly confirmed by observation of criminal conduct, and even of culpable conduct in daily life, than this,—that delinquency and guilt naturally shun investigation and seek concealment. The almost instinctive impulse which leads the perpetrator of a crime to destroy or otherwise get rid of evidence which would convict him of its commission, has already been alluded to. Where it becomes impossible to conceal a crime by expedients of this description, the criminal consults his safety by *concealing himself*; and where no facilities for such concealment are found, resorts to actual *flight*.

Concealment and flight, as observation constantly shows, are, in themselves, closely connected circumstances; the one aiding the other, and serving as a means of rendering it more effectual, in attaining the common end of both. The criminal flies from the scene of crime, to reach a place of concealment, even if near at hand; and he often conceals himself temporarily, and sometimes, in one hiding-place after another, with a view to a further or final and effectual flight, beyond the reach of justice and the danger of pursuit.

But, as it was shown in the last section, that guilty persons do not *always* betray emotion or uneasiness at the idea or prospect of discovery, so it is equally true that guilty persons do not *always*, and uniformly, hide themselves or fly, even where these would seem to be the only means left of escaping the legal consequences of their conduct, and such means are entirely within reach. In cases where the evidence of the crime is known to be merely of the *presump-*

*tive* kind, this may arise from a conviction that it is the better policy for the criminal to remain and show himself to view, and thus trust to the supposed or hoped insufficiency of the evidence, as it is, than to adopt a course which, while it always adds, and sometimes materially, to the force of such evidence, is, if unsuccessful, almost sure to result to his disadvantage. Hence the determination, sometimes taken, to assume the exterior of innocence, by remaining within the view and reach of justice. And accordingly we find these very facts,—that the accused did so remain, and did not fly when he might have fled,—often made use of in argument, before a jury, as a proof of innocence. (*a*)

But the omission, neglect or refusal, on the part of a criminal, to hide or fly, may also arise from moral causes, unconnected with any process of reasoning whatever. Thus, it may arise from that sort of infatuation which sometimes induces one who has actually and effectually escaped, to return to the scene of the crime, or its vicinity, and place himself within the grasp of justice. It may arise, also, from the very imbecility of despair. (*b*) And it may, finally, arise from the mere effect of sated passion. In some of the worst cases of murder, and usually such as are committed most openly, the criminal has not only refused to fly, but has awaited the approach of the officers of justice, and suffered himself to be arrested, without resistance. This conduct is, doubtless, often caused by a conviction of the hopelessness of any attempt at escape. But, in many cases, it appears to be referable to no other cause than a sort of disdain to adopt any measures of self-protection, and a willingness, if not a positive determination, to surrender life as the price of the revenge which has been accomplished.

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(*a*) It has been decided, however, that it is not competent for an accused party to show that, though he had opportunities of escape, he did not avail himself of them. *The People v. Rathbun*, 21 Wendell, 509, 518, 519.

(*b*) This was exemplified in the case of *Richardson*. When urged to fly, before his apprehension, his only answer was, “where can I fly to?” See *ante*, p. 246.

But cases like these are manifest exceptions to what may be called the general rule, course or habit of criminal conduct. If it be true that *some* criminals do not conceal themselves or fly, it is equally true that the vast *majority* do. It is sufficient to refer to daily observation and the police reports in the daily prints, for confirmation of this familiar fact. In some recent American cases of murder, it has been a prominent circumstance. (a) In *Carawan's* case, the expression made use of by the criminal, after the body of the deceased was found, and just before his flight, simply but forcibly describes the sum of the natural workings and promptings of the guilty mind:—"Boys, they have found *Lassiter*, (the deceased,) and I have got to go away or else I shall be hung." (b) *Beehan's* case (c) was one of instant, precipitate and continued flight, accompanied by concealment in one hiding-place after another, until the criminal was hunted down and captured by his pursuers. (d) Sometimes this concealment of the person is practiced to a limited extent. In *Cicely's* case (e) the criminal did not fly from the vicinity of the murder, but went the same night and gave information of it to a neighbor, as of a murder committed by other persons; but she lingered outside of the neighbor's house sometime before she came to it, and when she entered the house, she stopped near the door; and when asked to come near the fire where others were standing, she did not advance to the light, but retreated to a dark corner of the room, out of sight.

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(a) Among those which have been most frequently cited in the preceding pages, *The State v. McCann*, *The State v. Carawan*, *The State v. Arrison*, and *The People v. Beehan*, may be particularized.

(b) *The State v. Carawan*, Pamphlet Report, 52.

(c) *The People v. Beehan*, Suffolk (N. Y.) Oyer & Terminer, October, 1854.

(d) After having been pursued, upwards of two days, by a large number of the neighboring inhabitants, he was found hidden in a swamp about half a mile northeast of Hermitage depot, in the town of Southold, L. I., his head lying partly in the water, and apparently worn out with fatigue.

(e) *The State v. Cicely*, a slave, 18 Smedes & Marshall, 208, 218.

In minor crimes, variation from this general rule or habit of criminal conduct is of still more rare occurrence. The incendiary, the burglar, robber and thief, uniformly fly, or at least attempt to fly from the scene of crime to places of concealment. So natural is this course, and so constantly is it looked for and counted on, that any possible exception to it would undoubtedly be set down as an evidence of mental imbecility. The incendiary, burglar or thief, who should linger on the premises where he had committed his crime, or even in their vicinity, so as to afford an opportunity of capture, would be classed with the incendiary, burglar or thief who should attempt to set fire to, or enter, or steal from premises, in open day, and in full view of the occupants or others. Such conduct, in either case, would be interpreted into a desire or pre-determination to be apprehended, or into a natural inability to perceive and understand the common relation of cause and effect. Concealment and flight may, in short, be considered as parts of that grand policy of *secrecy* which has already been described as the natural characteristic of all criminal action, from its earliest stages to its latest consummations. (a)

So impressed was the old common law with considerations of this kind, that it laid down the rule, which passed into a maxim,—that flight from justice was equivalent to confession of guilt; *Fatetur facinus qui judicium fugit*. (b) But this maxim, (like some others,) (c) was undoubtedly expressed in too general and sweeping terms. It was defective in not taking notice of, and providing for certain important *exceptions*, having as clear a ground of truth as the maxim itself. For, as we have seen that guilty persons do not, in *all* cases, conceal themselves or fly; so it is equally true that persons sometimes do betake themselves to these expedients, who

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(a) *Ante*, pp. 68, 116, 124.

(b) 5 Co. 109 b, *Forley's case*. 11 Co. 60 b, *Dr. Foster's case*.

(c) See Best on Pres. § 61, note (b).

are not, in fact, guilty persons ; or, in other words, that *all* who hide themselves or fly are not necessarily and invariably guilty.

In the modern law of evidence, due attention has been given to these considerations and the exceptions established by them ; and, rare as they may in fact be, such prominence and weight are allowed to them, as to take from the circumstance of flight, in particular, the *conclusive* effect formerly attached to it, and to leave it merely its natural *presumptive* character, as an evidence of criminal agency. In the words of an able writer, who has already been repeatedly quoted in the present work, it “seems now nearly reduced to its true place in the administration of the criminal law, namely, that of *a circumstance*,—a fact, which it is always of importance to take into consideration, and, combined with others, may afford strong evidence of guilt ; but which, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility.” (*a*)

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(*a*) Best on Pres. § 248. This remark must be taken as true of every circumstance that can become an element of presumptive evidence ; and it is to be understood (to save repetition of the remark in each case,) as applying to every one of the circumstances which have thus far been considered, as well as to those which remain to be treated of. Not one of them, including even those of the strongest criminative aspect,—neither destruction nor fabrication of evidence, possession of a criminative article, possession of the fruits of crime, fear, flight, or even confession itself,—*standing alone*, is to be considered conclusive evidence of guilt ; although combination with other circumstances (and, sometimes, with a very few others,) will often make it so. And the reason of this is to be found in the existence of those *exceptions* to the general habit of criminal conduct, which have been mentioned in the text. Innocent persons have been known, in some cases, to destroy and even to fabricate evidence ; in others, to be in possession of highly criminative articles, and even of the fruits of crime ; and in others, to betray agitation in prospect of a criminal charge, to hide, to fly, and even (though far more rarely,) to confess guilt. In order, therefore, to avoid a result fatal to innocence, while applying what must be admitted to be the *general rule* of guilt, the modern law of presumptive evidence requires that *every one of these possible exceptions* (rare as its actual occurrence may be,) shall be carefully taken into view. And thus

It may be further remarked, that the importance of flight, as a criminative circumstance, depends materially upon the *time* when it takes place, and also upon the attending *circumstances*. Flight before accusation, or before any extraneous occurrences (such as great public excitement against the particular individual,) have operated to produce alarm or perturbation of mind, and thus to constitute a new motive of conduct, is more apt to be an exclusive consequence and product of conscious guilt, than flight afterwards. So, the circumstances which are sometimes found to accompany the act of flight,—such as disguising the person, obliterating the name from articles of clothing, &c. and assuming and passing under a feigned name, (*a*)—are important as imparting to it the character of an *intentional* act, as distinguished from a merely coincident and fortuitous occurrence.

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### SECTION XXIII.

#### *Conduct and Language on Arrest. Fear as expressed by Deportment.*

Supposing the concealment or flight of the party apprehending arrest, to be either impracticable or ineffectual, and that he finally falls into the hands of the law, his conduct in this situation is another circumstance which often furnishes important criminative evidence against him.

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the whole object of judicial inquiry, as conducted by the light of such evidence. is reduced to this:—to see, and to be satisfactorily convinced that the case under investigation does not fall within any of the exceptions.

(*a*) See, among other cases, *Rex v. Heath and Crowder*, (Wills, Circ. Evid. 98;) *Rex v. Howe*, (*Id.* 285;) *The State v. Curawan*, (Pamphlet Report, 122;) *The State v. Arrison*, Cincinnati Crim. Court, Dec. 1854.

Attempts to escape and to resist being taken by the officers of justice, are expedients daily resorted to by criminals caught in the very act. (*a*) If these are seen to be hopeless, attempts are often made, at the last moment, to conceal or destroy criminative articles about the person. The thief throws away his plunder; the counterfeiter, his spurious money; (*b*) the latter sometimes even attempting to get rid of it by swallowing. (*c*) In some cases, a murderer will attempt to put an end to all further inquiry, by deliberately destroying himself. (*d*)

Denial of his name by the arrested party, and denial of all knowledge of the crime, or of the subject of it, are frequently made and persisted in by persons whose guilt is afterwards clearly manifested. (*e*) Sometimes the manner is bold and actually defiant. In the case of Mrs. Arden, (*f*) although she had procured and aided in the murder of her husband, and had repeatedly plunged a knife into his dead body, her language, on being arrested and charged with the crime was,— “I would have you to know that I am no such woman.” (*g*) But soon after, on being confronted with the bloody evidences of the crime found on her premises, she confessed her guilt.

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(*a*) *The People v. Quackenboss*, 1 Wheeler's Crim. Cas. 91. See *Coe's case*, 1 City Hall Recorder, 141.

(*b*) *The People v. Pomeroy*, 2 Wheeler's Crim. Cas. 159. In this case, as the officers seized the prisoner, they saw him, by the light of the moon, drop from his hand a paper which he attempted to tread upon, and which was found to contain four counterfeit bills.

(*c*) *The People v. Haggerty*, 1 Wheeler's C. C. 195. *Galbrant's case*, 1 City Hall Recorder, 109.

(*d*) See, among other cases, *Regina v. Courvoisier*, *People v. Beehan*, *Commonwealth v. Webster*. In *The State v. Carawan*, the attempt, though at a later stage, was successful.

(*e*) *Rex v. Corder*, *Celebrated Trials*, 221. *The State v. McCann*, 13 Smedes & Marshall, 481.

(*f*) 5 London Legal Observer, 59, 60.

(*g*) In *Major Strangways' case*, also, the bearing of the accused was bold and undaunted. *Id.* 91.



It happens also, sometimes, that the criminal, at this stage, attempts to exonerate himself by directly or indirectly accusing another person. (*a*)

The passive deportment of accused persons, on being arrested as criminals, exhibits itself in a variety of forms: there being, in some instances, little or no emotion manifested; while, in others, it is considerable; and, occasionally, extreme.

Among the outward and visible marks of emotion or agitation, may be enumerated the following:—blushing, paleness, averting or casting down the eyes, trembling, fainting, sweating, weeping, sighing, distortion of countenance, sobbing, starting, pacing, exclamation, hesitation, stammering and faltering of the voice. (*b*)

It is to be observed of these physical appearances, that they are the symptoms of other passions besides that of *fear*; and that they (or some of them) are also found to manifest themselves at earlier stages, and in less trying situations. (*c*) But what is, at present, proposed in particular, is to consider them in connection with the fact of arrest, and in their character of evidences of the emotion of fear; that is, of fear of the legal consequences of the act committed, which the fact of arrest shows to be now closely impending. (*d*)

The mere expression of agitation on being arrested on a charge of crime, especially in the less violent forms of blushing and paleness, is, in itself, a circumstance of little or no criminative weight. It is an impulse of nature, consequent upon extreme surprise, to which the innocent

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(*a*) *Rex v. Donellan*, Celebrated Trials, 149. *Commonwealth v. Webster*, Bemis' Report, 179.

(*b*) This is nearly the enumeration of Mr. *Bentham*. See 3 Jud. Evid. 153, note.

(*c*) See *ante*, p. 463.

(*d*) Mr. *Bentham* traces the connection between the physical appearances and the fact of crime, by a formal series of links and inferences. 3 Jud. Evid. 153—155

may yield as well as the guilty. Nay, it may happen that the more innocent the party, the greater the shock occasioned by such a proceeding. Indignant astonishment at the bare mention of a charge of guilt, is an emotion sufficiently powerful to send the blood to the countenance, or withdraw it in paleness. In more sensitive and excitable natures, the mere idea of arrest and the publicity consequent upon judicial inquiry, (though on a perfectly groundless accusation,) will suffice to produce, at least for a time, the additional symptoms of trembling, faltering and confusion. On the other hand, the most hardened offenders are frequently those who are seen to betray the least agitation or even disquietude, under the exciting circumstances of an arrest.

But where the agitation is violent in the extreme, so as literally to overwhelm and prostrate the accused, and maintains its mastery over him for a length of time, whatever allowances may be made for peculiar sensitiveness of temperament, or state of health, or natural weakness of the faculty of self-control, it seems to be more difficult to reconcile these appearances with the fact of innocence; at least, if by innocence he understood, not only the absence of all guilty participation in the transaction alleged, but the absence, also, of all knowledge of it. The case of *Commonwealth v. Webster* may be here referred to, as exhibiting on the part of the accused, a degree of utter prostration on arrest, which has rarely been paralleled. (a)

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(a) On being left for a time, at the jail, by the officers, the accused paced the floor and wrung his hands; then sat down and had a spasm, as if in a fit. On the officers taking hold of him, to commit him to the lock-up, it was found that he could not stand, but had to be supported and led along. The spasms or convulsions continued after he had been laid in his berth. Bemis' Report, 179, 192. On being taken to the Medical College, his agitation continued. When in the laboratory, he called for water, but could not drink it when handed to him. A witness describing his conduct, said "He seemed like a mad creature. When the water was put towards him, he would snap at it with his teeth, and push it away with great violence without drinking, as if it were offensive to him."

Under the present head, it may be proper to take notice of the effect produced on an individual, charged with the crime of murder, by the *sight*, and especially the *touch of the body* of the deceased.

It will be sufficient to pass lightly over the old superstitious belief, that, by a mysterious sympathy of nature, the body of a murdered person, though dead for some considerable time, would *bleed* at the *touch* of the murderer. The idea seems to have been, at an early period, turned to practical account, by making use of the ceremony of *touching the corpse*, as a test or means of detecting the murderer when unknown, and singling him out from the number of those by whom it was required to be performed. There are some cases on record, in which bleeding and other extraordinary appearances of the dead body, on being touched by a suspected party, have been testified to, as actual occurrences, by persons of character and standing, representing themselves as eye-witnesses of the phenomena. (*a*)

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*Id.* 60. When led close up to the remains of the body of the deceased, he, in the words of another witness, “ appeared to be very much agitated; sweat very badly, and the tears and sweat ran down his cheeks as fast as they could drop.”

*Id.* 120, 121. The perspiration was so excessive as to wet through his clothing.  
*Id.* 193.

The prisoner, in his confession, afterwards stated that, on finding himself arrested, he determined to destroy himself; and, before leaving the carriage, when it stopped at the jail-door, took a pill of strychnine from his pocket and swallowed it. Bemis’ Report, 571. How far some of the more violent symptoms which have just been described, were referable to the action of this poison, it would be impossible to say. It was his own opinion, that the state of his nervous system probably defeated its action partially. *Id. ibid.*

(*a*) In the case of the *Norkotts* and others, which was an appeal of murder brought by the child of the deceased, in the 4th year of *Charles I.*, after the acquittal of the accused on an indictment and trial, it was testified by “ an ancient and grave person, minister to the parish where the fact was committed,” that, the body being taken up out of the grave, thirty days after the party’s death, and lying on the grass, and the four defendants being present, they were required, each of them, to touch the dead body. Upon the touch of the first, the brow of the dead, which before was of a livid color, began to have a dew or gentle sweat arise on it, which increased by degrees, till the sweat ran down in drops on the face; the brow turned to a lively and fresh color. and th-

Out of this ceremony probably grew the modern practice of requiring an individual, arrested on suspicion of murder, to touch the body or take the hand of the corpse. This, too, was, as it still is, used in the way of a *test*, but with an object very different from that of the ancient proceeding; namely, in order to observe its effect, not on the body, but on the *accused* himself: the agitation produced and manifested in consequence of touching, or even looking at the corpse, or the refusal to touch or look at it, being considered as affording important indications of guilt. In some of the cases which have been referred to, in the present work, this practice was resorted to, but with results so different, as to show how little it was to be depended on, as a means of developing truth. An instance of its use occurred in New York, as late as 1824; and, in Scotland, no longer ago than 1835. The cases will be found in the subjoined note. (a)

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deceased opened one of her eyes, and shut it again; and this opening the eye was done three several times; she likewise thrust out the ring or marriage-finger three times, and pulled it in again; and the finger *dropped blood* from it on the grass. Upon being asked by the Chief Justice, (Sir *Nicholas Hyde*) who saw this besides himself, the witness referred to another person present, minister of the next parish adjacent to his own; who, being sworn in the case, confirmed the testimony in every point; and the first witness then added that he himself dipped his finger in the blood which came from the dead body, to examine it, and he swore he believed it was blood. 14 State Trials, 1324, 1326.

In *Philip Standfield's* case, which occurred in 1688, although no formal ceremonial was performed, the same result of bleeding at the touch of the accused was proved by evidence in the case. One of the surgeons by whom the body had been examined and opened, testified that, after the body had been sewed up, and clean linen put on, he desired that the friends of the deceased might lift it into the coffin; and that the accused, having come and lifted up the head, let it fall upon the table suddenly, and retired back quickly, rubbing his hands on his breast and crying "O God! O God!" or some such words; that the deponent, being astonished thereat, looked to the corpse, and as the accused took away his hand from it, saw it *darting out blood* through the linen, from the left side of the neck which he had touched. 11 State Trials, 1402, 1403. See also *Id.* 1409.

(a) In the case of Major *Strangways*, in 1657, the prisoner, on being commanded to take the deceased by the hand and touch his wounds, before

## SECTION XXIV.

*Silence under Accusation.*

We proceed, in the next place, to consider the conduct of a person suspected of or charged with a crime, on being either directly accused of its commission; or interrogated as to that fact, or as to some of the attending circumstances; or upon mere observation being made in his presence, in reference to the subject: such conduct taking, for the most part, the general shapes of *answering* and *refusing to answer* interrogation; or, as it has been termed by some writers, “*responsion*” and “*non-responsion*.” (a)

The interrogation itself, which is intended to elicit this conduct, is of two descriptions:—that which proceeds from

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the coroner’s inquest, did so, without betraying any emotion that could be ascribed to a sense of guilt. 5 Lond. Legal Observer, 90. See also *Stewart Abercrombie’s* case, in 1718, mentioned in Burnett’s Treatise on the Criminal Law of Scotland, p. 529. In the Scotch case of *John Adam*, in 1835, the accused, on being desired by the procurator-fiscal, to take the hand of the deceased, (who was his wife,) and say whether he had ever held it before, did so with scarcely a symptom of agitation, while denying all knowledge of the person. 11 *Id.* 415.

In Mrs. *Spooner’s* case, at Brookfield, Mass. in 1788, the accused for a time refused even to look at the body, but finally, on being requested, laid her hand on the forehead, and said “poor little man.” The report does not mention that she seemed otherwise affected. 2 Chandler’s Am. Crim. Trials, 13, 14.

In the comparatively recent case of *The People v Johnson*, at New York, March, 1824, the prisoner was taken out of his cell to the hospital, by Mr. *Hays* the high constable, and was required to touch the dead body of the murdered man *Murray*. He did so, and the act affected him so powerfully, that he was brought to the police office in great perturbation of mind, and confessed the murder. 2 Wheeler’s Criminal Cases, 378. It was afterwards objected, at the trial, in behalf of the prisoner, that the confession obtained under these circumstances was not admissible in evidence. But the court overruled the objection, without expressing any opinion adverse to the practice. *Id. ibid.*

(a) These terms are of the coinage of Mr. *Bentham*, but they have been freely used, and without objection, by Mr. *Best*. 3 Benth. Jud Evid 81 Best on Pres. §§ 239—248.

the court before which the party is formally arraigned for trial, or from the magistrate before whom he is preliminarily taken, on his arrest, which is termed *judicial* interrogation: (*a*) and that which comes from private individuals, which is termed *extra-judicial*; the latter species often reaching back to a point considerably anterior to the party's arrest.

The conduct of the individual, thus interrogated, assumes one or more of the following varieties of forms. He either maintains a total silence, or refuses, in terms, to answer any questions; or, if he answers, answers evasively or imperfectly; or gives an answer which is either seen or known or subsequently proved to be wholly false; or which may reasonably be regarded as false, on account of its inconsistency with known facts, or with other statements made by him, or on account of its great intrinsic improbability. The first of these varieties of conduct will form the subject of the present section.

The limits of strictly judicial interrogation (*b*) being, (under the common law system of procedure,) very narrow, (*c*) the effect of silence under such interrogation has been considered as, on the whole, not more criminative than that of non-response to interrogation out of court. (*d*) Cases, however, may be easily imagined, in which a refusal to answer, on judicial interrogation, would be allowed to be regarded with far less favor than similar conduct towards a private individual, having no authority to interrogate.

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(*a*) It might be more accurate to call interrogation which proceeds from the court, strictly *judicial*; and that which proceeds from a magistrate, *quasi judicial*. See *infra*, and the next note.

(*b*) That is, interrogation by the court which sits to try the prisoner.

(*c*) Instead of the elaborate and protracted interrogation of the accused, which constitutes a principal portion of most criminal trials on the continent of Europe, the only questions allowed to be put to him are, to desire him to plead guilty or not guilty; and, if the latter, to call on him for his defence, after the evidence for the prosecution is closed. Best on Pres. § 240.

(*d*) Best on Pres. *ubi supra*.

Such silence might be so far coupled with a stubborn, contemptuous, defiant manner, as to reveal its source in a temper and spirit at variance with all true ideas of the demeanor of innocence. (a) But conduct of this kind is, under the practice of our courts, rarely fully exemplified; the accused being, in most cases, under the salutary control of his own counsel, whose answers in his behalf are always accepted.

As to absolute silence under the interrogation of a *magistrate*, or the equivalent course, on the part of the accused, of saying that he declines to answer any questions, it is clear that no presumption of guilt can be held to arise from such conduct; (b) it being a privilege often allowed the accused by express provision of law. In some states, it has been provided by statute, that, at the commencement of the examination, the prisoner shall be informed by the magistrate, that he is at liberty to refuse to answer any question that may be put to him. (c) This brings us to the consideration of the effect of silence under *extra-judicial* interrogation or remark.

Where a statement is made either directly to a person, or within his hearing, that he was concerned in the commission of an alleged crime, to which he returns no reply, "the natural inference," observes an able writer, "is that the imputation is well founded, or he would have repelled it." (d) So where he is distinctly asked if he was not concerned in the transaction, or openly accused of having been so concerned, (e) or called upon to explain certain strange or suspicious appearances connected with his person or con-

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(a) The evidence afforded by the demeanor of the accused, during trial, will be more particularly considered under a future head.

(b) Best on Pres. § 242. *Rex v. Appleby*, 3 Stark. R. 88, cited *ibid*.

(c) 2 New York Revised Statutes, 708, § 15; [592, § 15, 2d ed.]

(d) Best on Pres. § 241.

(e) See *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841. Pamphlet Report, 12.

duct; (a) silence on his part, especially if obviously voluntary (b) and persisted in, (c) is a circumstance authorizing similar unfavorable interpretations. That voluntary silence, especially under circumstances reasonably demanding remark of some kind, amounts to admission, is a principle every day recognized and acted upon, not only in legal proceedings, (d) but in ordinary life. (e) An innocent person, aware of this familiar principle, would naturally, out of mere regard for self-preservation and a desire of avoiding prejudicial consequences, do all in his power to escape its application. And, independently of this consideration, it may be said to be the nature of innocence, to be impatient of a charge of guilt, whenever seriously made and distinctly understood; to repel it with earnestness; to exclaim against it, and to challenge instant investigation.

Hence the rule that whatever is said to a prisoner, or in his presence, except when before a magistrate, is admissible in evidence; and it makes no difference that what was said was said by a person who cannot be called as a witness, such as the prisoner's wife. (f)

But it is always to be borne in mind that the criminative effect of the circumstance of silence (or implied admission) under extra-judicial interrogation or remark, like that of

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(a) *Id. ibid.*

(b) As to this quality, see *infra*.

(c) A mere momentary or brief silence, being often attributable to the effect of extreme surprise, might, of course, be consistent with entire innocence. See the lines quoted in Best on Pres. § 250.

(d) *Qui tacet consentire videtur*. Jenk. Cent. 32, case 64. *Id.* 68, case 30. *Id.* 226, case 87. 1 Story's Eq. Jur. §§ 385, 388, 389. But this maxim, as Professor Greenleaf observes, "is to be applied with careful discrimination." 1 Greenl. Evid. § 199. And see the cases cited *ibid.*

(e) "Silence is tantamount to confession," is an observation, observes Mr. Bentham, "which, whether it may happen or not to have been yet received in any collection of proverbs, is repeated and acted upon, with not less confidence and certainty, with not less safety, than the most familiar of the sayings which have been thus distinguished." 3 Benth. Jud. Evid. 86.

(f) 2 Russell on Crimes, 866. *Rex v. Smithies*, 5 Carr. & P. 332.



confession or positive admission, in a similar case, depends upon the consideration that it is the result of free and *voluntary* action on the part of the accused. In a recent case in Massachusetts, (a) it was held that the fact that a person who had just been arrested on a charge of theft, and was in the actual custody of the officers, made no reply to a direct accusation by the person claiming to have been robbed, could not be made use of in evidence against the prisoner. The facts of the case were these. Two watchmen took *K.* into custody, and carried him to a watch-house; and one of them there said that *K.* had been robbing a man. *R.* soon came in and pointed to *K.* and said, "that man has stolen my money." While one of the watchmen was proceeding to lock up *K.* *B.* saw *K.* put something on a shelf in the watch-house, and *B.* thereupon took from the shelf a bag of money, and *R.* said it was his bag, and that it was all the money he had. *K.* was within hearing of all that was said, after he was carried to the watch-house, and *made no reply* to any part of it. The court, (*Shaw*, C. J.) held that the declaration of the party robbed, to which the accused made no reply, could not be used as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The court dwelt on the *situation* of the accused, as being in the custody of persons having official authority, who were just putting him into confinement; and said that the statement made to the officers by the party claiming to have been robbed if not strictly an official complaint to officers of the law, was a proceeding very similar to it; and that the accused might well suppose that he had no right to say anything until regularly called upon to answer. (b)

The general doctrine on this subject, as laid down by the learned chief justice, on this occasion, is comprised in the

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(a) *Commonwealth v. Kenney*, 12 Metcalf, 285.

(b) *Id.* 288.

following extract from his opinion. (a) "In some cases, [where a declaration in regard to facts affecting a party's rights is made in his hearing,] and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. (b) So, if the matter is of something not within his knowledge; (c) if the statement is made by a stranger whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights; by a belief that his security will be best promoted by his silence: then no inference of assent can be drawn from that silence." (d)

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(a) *Id.* 237.

(b) See 1 Phill. Evid. 400.

(c) Where the truth or falsehood of a material fact is known to a party to whom the fact is asserted to exist, his omission to deny its existence is presumptive evidence of its truth. When not known, his silence furnishes no evidence against him. *Robinson v. Blen*, 20 Maine, 109. See 1 Greenl. Evid. § 199, and the cases cited, *ibid.*

(d) Where a person accused of the crime of homicide remains silent, the jury may infer his guilt or innocence, according to circumstances. *State v. Swink*, 2 Dev. & Batt. 9.

## SECTION XXV.

*Evasive and Incomplete Response.*

In the next class of supposed cases which occurs for consideration, the party interrogated, or in whose presence and hearing a statement is made, intended to criminate him, instead of maintaining a total silence, or refusing in terms to answer at all, takes the course of responding, but only in a certain way, and to a certain extent. In other words, he either answers evasively or only in part.

Evasive response to interrogation is often attributable to quite a different motive from that which prompts entire silence or refusal to answer; and it places the accused himself in a correspondingly different position. Silence, or a total refusal to answer or notice an extra-judicial interrogatory or remark, may proceed from a determination not to recognize the right or authority of the party interrogating or remarking, to examine, or question or expect a reply, in the case. But any such ground of objection is waived when the accused consents to answer at all. (a) Again, total silence on the occasion of any kind of interrogation or statement, may proceed from mere unreasoning stubbornness, or natural stupidity. But in answering evasively, more or less of thought and art is necessarily called for and exercised. The latter course, moreover, undoubtedly amounts to an admission that appearances are against the accused, and call for an answer of some kind or other. In its character of a criminative circumstance, therefore, evasive response

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(a) "The declaration," observes Professor *Greenleaf*, "may be impertinent and best rebuked by silence; but, if it receives a reply, the reply is evidence." 1 *Greenl. Evid.* § 199. And see the observations of *Shaw, C. J.* in *Commonwealth v. Kenney*, 12 *Metcalf*, 285, 287.

is ordinarily of greater weight and force than simple silence. (a)

Of evasive response to a direct charge of being concerned in a murder, the case of *The State v. Peter Robinson* (b) furnishes a good illustration. An acquaintance of *Robinson's* having had his suspicions awakened by the fact that the latter had in his possession a bond and mortgage which he had previously executed to his creditor, Mr. *Suydam*, who had then recently and suddenly disappeared, directly charged him, one day, with being implicated in *Suydam's* murder. "His countenance," said this individual, afterwards a witness on the trial, "changed very considerably, and, after stuttering and stammering for some time, he said, "Do people suspect me of murdering him?"

In the next form of response which may be considered

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(a) In the case of *Rex v. Smithies*, (5 Carr. & P. 832,) the rule was fully recognized by the court, that whatever is said to a prisoner on the subject matter of the charge against him, to which he makes no direct answer, is receivable as evidence of an implied admission, on his part.

Some remarks of Mr. *Bentham* on the subject of evasive response, though applicable, for the most part, to evasion of formal interrogation of the *judicial* kind, may be here subjoined, as contributing to illustrate the general subject of the present section. "Evasive response is response in words and appearances, non-response in effect; it may be termed virtual non-response. \* \* \* It is tantamount to silence, or rather, in the case of evasion, (if there be any difference,) the inference is stronger. Silence may be ascribed to stupidity; evasion is the work of art,—the natural resource of self-condemning consciousness." 3 Jud. Evid. 95. The great object of this expedient, according to the same writer, is to produce the desired effect of silence, without producing the effect which is undesired: and the means employed to accomplish this object is *indistinctness* of statement. *Id.* 96. "Evasion," in his opinion, "is a sort of middle course between non-response, false exculpatory response, and confessorial response. Compelled to say something, on pain of the consequence which cannot fail to attach upon his virtual refusal to say any thing, a man keeps saying what amounts to nothing; partly in the hope that the imposition may pass undetected, and the insignificant discourse be accepted, as if it were significant; partly to give himself time to consider into which of the two other paths,—confessorial truth or exculpatory falsehood—he shall betake himself." *Id.* 96, 97.

(b) Pamphlet Report, 12.

under the present head, the party interrogated or charged, answers promptly, directly and distinctly, but only to a certain extent; that is, he denies his guilt, and that possibly in the strongest terms, and perhaps repeatedly, with many asseverations of innocence; but, on being required to give some evidence of his innocence, or to explain certain suspicious or criminative appearances or circumstances brought forward in his presence, and upon which the general accusation of guilt itself often materially rests, either remains, as to them, wholly silent, or gives an evasive and unsatisfactory answer. (a) The effect of this species of conduct is not very different from that of total silence itself; the tacit admission that the charge is, in appearance at least, well founded, serving to neutralize the express denial that it is, in fact, true. The exculpatory or infirmative considerations applicable to this circumstance, will be presented hereafter, under the proper head.

## SECTION XXVI.

### *False Response or Explanation.*

It remains to consider that class of cases, in which a party who has denied a charge of guilt, on being interrogated as to any particular circumstances connected with the transaction, or desired to explain certain suspicious appearances, instead of refusing or evading reply or explanation, *replies* without objection or hesitation, and in a direct manner, and sometimes with apparent fullness; but, in so doing, in fact replies *falsely*.

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(a) *The State v. Robinson*, Pamphlet Report, 12.

The falsity of the response, which is the material consideration in these cases, is ascertainable in various ways, and in various degrees of completeness.

First; it is very satisfactorily established by meeting and contradicting the statement or explanation by *express proof*. Thus, in *Howe's* case, (a) the prisoner, on being examined before the magistrate, stated that he was at Stourbridge, (near which the crime was committed,) on the 18th of December, (the day of the murder,) but that he was not out of it, from the time of his arrival there, at one o'clock in the afternoon, until half-past seven o'clock on the following morning; that, in the afternoon of that day, he went to look about the town for lodgings, and ultimately went to his lodgings about six o'clock in the evening. But it was proved by several witnesses, that he had been seen by them, between four and five in the afternoon of the day in question, on the road leading from Stourbridge toward and not far from the spot where the murder was committed. About half-past five, the prisoner was seen going in great haste, in the direction from the spot where the deceased had been shot, towards Stourbridge. He afterwards called at two public-houses at Stourbridge,—at the first of these, about six o'clock, and at the other, about nine o'clock the same evening; at both of which places, the robbery and attack were the subjects of conversation, in which the prisoner joined. By means of this proof, it was satisfactorily shown that the account which the prisoner had given of himself was a tissue of falsehoods.

Secondly; the falsity of the response or explanation of an accused party is sometimes made apparent by being shown to be *inconsistent* with *other facts*. In *Richardson's* case, (b) the accused accounted for spots of blood appearing on his stockings, by saying that he had assisted at bleeding a horse, when he wore them. But it was proved that

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(a) *Rex v. Howe*, Stafford Spring Assizes, 1818; Wills, Circ. Evid. 234, 236.

(b) See *ante*, p. 246.

he had not actually assisted, although present, on that occasion, but had stood at such a distance that no blood could have reached him. In the case of *State v. Adams*, (a) where the prisoner was found in possession of a stolen horse, his story was, that he had purchased the horse at a place named. But the facts showed that he could not have had time to have done that, and reached the place where the horse was found with him.

Thirdly; the falsity of the response or explanation of the accused is frequently shown by its *inconsistency* with other statements made by *himself*; or, where there are two or more associated in the offence, by the inconsistency of the account given by one with that given by another. (b) In *Patch's* case, (c) the prisoner, on his examination before the coroner, made several inconsistent statements as to his pecuniary transactions with the deceased, and equivocated much as to whether he wore boots or shoes on the evening of the murder, as well as to his ownership of a pair of stockings which were found rolled up in his sleeping room, the soiled condition of which constituted a strong circumstance against him. In *Riley's* case, (d) there was great inconsistency of statement; the prisoner first saying she was a widow, and then that she had a husband; first saying that the property found in her possession was hers, and that she had purchased it in Philadelphia, and then that it was brought to her house by a man who was in embarrassed circumstances, to conceal it from his creditors. In *Peter Robinson's* case, (e) the accused, when asked where he got the money with which he had taken up a bond and mortgage, which he had in his possession, and claimed to have paid

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(a) 1 Haywood's (N. C.) R. 464.

(b) See *Reynolds's* case, 2 City Hall Recorder, 47.

(c) *Rex v. Patch*, Surrey Spring Assizes, 1806; Wills, Circ. Evid. 230, 233

(d) 1 City Hall Recorder, 23.

(e) Pamphlet Report, 12, 14.

off, said at first, that he had it out at interest, and afterwards that he had had it by him eighteen months.

“False answers,” in the words of an acute writer, “are, naturally enough, interspersed more or less with self-contradictory ones. The case is no otherwise varied by the intermixture than by this, viz. that, in the case of self-contradiction, the falsehood is more palpable and incontestible.” (a) And the effect of manifest self-contradiction, (like that exhibited by a witness on examination,) is generally to impair, and sometimes to destroy the credibility even of other accompanying statements. (b)

Lastly; the falsity of statements or explanations made by accused parties, under examination or interrogation, is often made more or less apparent by their intrinsic *improbability*. This is particularly exemplified in cases where causes are attempted to be assigned for an obviously violent death, or where the accused undertakes to relate the particulars of the death, as it occurred in his presence. In *Greenacre's* case, (c) where *accident* was the cause of death assigned, the prisoner's statement, as made after his arrest, was ingenious and plausible, being to the following effect:—that, while the deceased was in his house, one evening, they had an altercation; and that, during the conversation, the deceased was moving backwards and forwards in her chair, which was on the balance; that he put his foot to the chair, when she fell back with great violence against a block of wood; and that, finding life extinct, he made up his mind, in the alarm of the moment, to conceal her death and get rid

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(a) 3 Benth. Jud. Evid. 94, 95.

(b) One of the most singular instances on record, of statements deliberately made by a prisoner on his examination at different times, before a magistrate, contradicting each other, in almost every particular, occurred in the comparatively late Scotch case of *John Adam*, in 1835. See 11 London Legal Observer, 415, 416.

(c) *Rex v. Greenacre*, Central Criminal Court, April, 1837; Wills, Circ. Evid. 171.



of her remains: which he effected by dismembering the body, and scattering the parts about in different places. (a) In *Tawell's* case, (b) where *suicide* was the cause of death assigned by the prisoner, the account of the occurrence given by him, while in custody during the coroner's inquest, was as follows:—that the deceased had been teasing him for money, and threatened to destroy herself if he did not send her some; that, on the evening in question, they had an altercation, in the course of which he had told her he would not allow her any more money; that she then asked him for some porter, which she went for and procured from a neighboring tavern; that she poured something into it from a small phial, and drank of it, and then began to *throw herself about*; and that he left, thinking her illness feigned, or else would have called some one.

( Another cause frequently assigned to account for a manifestly violent death, is the *felonious act of another person*. In some cases, a murderer has been known to content himself with thus barely attributing the crime to another, without giving any particulars of information in support of the charge; while, in other cases, more or less of detail is ventured on. Thus, in *Rush's* case, (c) the prisoner attributed the murders to other persons, but gave no definite names, nor any clue to such persons, and not one of such persons was found. In *Patch's* case, (d) the prisoner went farther, and suggested the influence of malicious feeling in two persons with whom the deceased had been on ill terms; but (in addition to the conclusive fact that they were at a distance

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(a) It was clearly shown, from an anatomical examination, that the death could not have happened in this accidental manner.

(b) *Regina v. Tawell*, Aylesbury Spring Assizes, 1845; Wills, *Circ. Evid.* 198, 200.

(c) *Regina v. Rush*, Burke's Trials connected with the Upper Classes, 458, 515. See also, the late case of *The People v. Beehan*, Suffolk (N Y.) Oyer & Terminer, October, 1854.

(d) *Rex v. Patch*, Wills, *Circ. Evid.* 230, 233.

from the scene of crime, at the time of its commission,) it was shown that they had no motive for doing any such injury. In *Riembauer's* case, (a) the accused not only stated that the crime had been committed by a female whom he named, as she herself admitted to him, but undertook to explain how it was done: saying that, on entering his own apartment, one day, after a considerable absence, he found the deceased dead on the floor; and, that, overcome by the entreaties of the female to whom he attributed the death, and her mother, he consented to conceal the crime by interment of the body. In *Robinson's* case, (b) the accused took a similar course, not only charging the commission of the crime upon another individual, whom he designated, but undertaking to show how it was committed; saying, that the person indicated came to his house on the same day on which the deceased visited it; that he killed the deceased, during his own temporary absence from the room, and then compelled him, by threats, to assist in carrying the body down stairs, to the basement, where it was buried. The gross improbability of this story rendered its falsity so apparent, that no serious attempt appears to have been made even to subject the party implicated, to interrogation respecting it.

Under this head may also be classed those cases where persons found in possession of stolen property, and charged with the theft, attempt to exculpate themselves by saying that they *found* it, (c) or that they received it from another person; but give no names, nor any particulars by which the truth of the statement may be proved.

False explanations, not only of the leading facts of a transaction, but of minor, collateral and auxiliary facts, may often be detected by the same test of improbability.

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(a) 3 London Legal Observer, 277.

(b) *The State v. Robinson*, Pamphlet Report, 24, 25, 26.

(c) 2 East's P. C. 668.

Thus, in *Peter Robinson's* case, (a) the accused accounted for the possession of the mortgage and other papers, of which he made no secret, by saying that they had been given him by his creditor, Mr. *Suydam*, on receiving the amount of his debt, which he paid him, one evening at *Suydam's* own house, where he went by appointment for the purpose. He said, however, that *Suydam* had given him no receipt for the money, and none was found upon the bond or mortgage. Upon being then asked to explain how it happened that a person so well acquainted with the forms of business as Mr. *Suydam*, had not endorsed the usual receipt, he said—"he was in *such a hurry* he did not think of it." (b)

False response to interrogation whether judicial or extra-judicial, is called by a learned writer, "a criminative fact infinitely stronger" than either of the two varieties of conduct which have been considered, viz. silence, and evasive or incomplete reply; (c) and it is often found, in practice, to bear with decisive weight against a prisoner. It is a most complete waiver, in particular, of all objections derived from supposed want of right, or authority, or competency, in the interrogator. The remark or question even of a child, which might safely be passed by without any notice, if re-

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(a) *The State v. Peter Robinson*, Pamphlet Report, 13, 15, 22.

(b) *Id.* 15. It is remarkable that, in the case of *Commonwealth v. Webster*, where a similar payment of a mortgage debt was alleged by the accused, a similar representation of the conduct of the deceased was made by him, in his account of the transaction; only, the "hurry," in this case, was described to be much greater, and, indeed, quite extraordinary. The statement of the accused was, that he counted the money down to the deceased, on his lecture-room table; that the deceased "grabbed up the money, without counting it, and ran up, as fast as he could," two steps at a time, the steps upon which the seats are elevated in the lecture-room; and said that he would go immediately to Cambridge and discharge the mortgage. Bemis' Report, 106, 127, 168, 176.

(c) Best on Pres. § 243.

sponded to falsely, gives to such false response the quality and force of evidence. (a)

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## SECTION XXVII.

### *Indirect Confessional Evidence.*

Full confessions of guilt, by an accused party, are in the nature of *direct* evidence, (b) and therefore do not properly fall within the scope of the present work. A brief notice, however, of the character of these statements, and their effect as proof, will not be out of place. (c)

Confessions of this kind, when deliberately and voluntarily made, are justly regarded as constituting the highest and most satisfactory species of evidence that can be presented before a tribunal. (d) They combine the statement

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(a) "In justification of simple silence," observes Mr. *Bentham*, "the defence [of incompetency on the part of the interrogator] might be pertinent, if not convincing; to false responsion the application of it could scarce extend. Of the claim it had to notice, you yourself [that is, the accused,] have borne sufficient testimony; so far from grudging the trouble of a true answer, you bestowed upon it the greater trouble of a lie." 3 *Jud. Evid.* 94.

(b) 8 *Benth. Jud. Evid.* 9, 108. *Best on Pres.* § 253. *Wills, Circ. Evid.* 60. According to Mr. *Starkie*, a full confession, though one of the surest proofs of guilt, is only *presumptive* evidence of that fact; resting upon the *presumption* that no innocent man would sacrifice his life, liberty, or even his reputation, by a declaration of that which was untrue. 1 *Stark. Evid.* 32. And see 1 *Phill. Evid.* 897. 1 *Greenl. Evid.* § 215. But it seems to be in no other sense presumptive, than *all direct* evidence, which, as has been shown, rests upon the analogous general presumption that the witness who delivers it speaks the truth. See *ante*, p. 7.

(c) The subject is treated at considerable length by Mr. *Bentham*, and also by Mr. *Best*, and Mr. *Wills*.

(d) 1 *Gilb. Evid.* 123. 1 *Stark. Evid.* 82. 1 *Phill. Evid.* 897. 1 *Greenl. Evid.* § 215, and authorities cited *ibid.* *Wills, Circ. Evid.* 60. 2 *Russell on*

of the physical facts which form the basis of the charge, (and which is substantially the deposition of a witness to those facts,) with that other most important species of evidence which can never be directly reached and brought to view by any other means; namely, that which presents the *motives* and *intents* which instigated and directed the criminal act; and these avowed by the party who, of all others, has the strongest interest to conceal them. (a) "They are received in evidence," observes Mr. *Phillipps*, "on the same principle upon which admissions in civil suits are received, namely, the presumption that a person will not make an untrue statement against his own interest. In criminal cases a confession carries with it a greater probability of truth than an admission in civil cases, the consequence being more serious and penal; *habemus optimum testem confidentem reum*." (b) Their value, in the words of Professor *Greenleaf*, depends "on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law, received in evidence, as among proofs of guilt." (c)

Confessions are divided into two classes, namely, *judicial* and *extra-judicial*. (d) *Judicial* confessions are those which

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Crimes, 824. *Grose*, J. in *Lambe's case*, 2 Leach C. Cas. 554, [625, 629,] *Warickshull's case*, 1 Leach C. C. 263, [298.] *Nott*, J. in *The Corporation of Columbia v. Harrison*, 2 Rep. Const. Court, 215. For the cautions to be observed in receiving confessions, including the informative considerations applicable to them, see 1 Greenl. Evid. § 214. 1 Phill. Evid. 397. 2 Russell on Crimes, 824, note.

(a) Best on Pres. § 253. 3 Benth. Jud. Evid. 107.

(b) 1 Phill. Evid. 397.

(c) 1 Greenl. Evid. § 215.

(d) 1 Greenl. Evid. § 216. Best on Pres. § 253. 1 Pothier on Obligation, part 4, c. 3, sect. 1.

are made before a magistrate, or in court, in the due course of legal proceedings; such as the preliminary examinations taken in writing by the magistrate, pursuant to statutes, and the plea of "guilty" made in open court to an indictment. (a) *Extra-judicial* confessions are those which are made by the party elsewhere than before a magistrate, or in court; this term embracing not only explicit and express confessions of crime, but all those admissions of the accused, from which guilt may be *implied*. (b)

According to Professor *Greenleaf*, judicial confessions of guilt are "sufficient to found a conviction, even if to be followed by a sentence of death, they being deliberately made, under the deepest solemnities, with the advice of counsel and the protecting caution and oversight of the judge. Such was the rule of the Roman law;—*Confessos in jure, pro judicatis haberi placet*; and it may be deemed a rule of universal jurisprudence." (c) Mr. *Best*, however, is of the opinion that, "if the confession appear incredible, especially if there are no traces to be found of a *corpus delicti*, or it is manifest that the prisoner has some collateral object in view, to induce him to make a false one, the judge ought not to receive it." (d)

As to the force and effect of *extra-judicial* confessions, the rule does not seem to be clearly laid down in the English books; or rather, it seems to have been laid down, on different occasions, in very different forms, namely:—first, that a full confession by an accused person, that he had committed a crime, without proof of any circumstance tending to corroborate it, and without independent proof of a *corpus delicti*, (or the general fact that a crime had been commit-

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(a) 1 *Greenl. Evid.* § 216.

(b) *Id. ibid.*

(c) *Id. ibid.* citing *Cod. lib. 7, tit. 59*; 1 *Poth. on Obl. pt. iv. ch. 8, § 1, num. 798*; *Van Leeuwen's Comm. B. 5, ch. 21, § 2*; *Mascard. De Probat. vol. 1, concl. 844.*

(d) *Best on Pres. § 254.*

ted,) was sufficient to warrant his conviction; (a)—secondly, that such confession, uncorroborated, provided there was independent proof of a *corpus delicti*, was sufficient for the same purpose; (b)—and thirdly, that such confession, even where there was proof of a *corpus delicti*, was insufficient, without some corroborative evidence of its truth. (c) The second of these three states the rule as it has received the approval of Mr. *Best* (d) and Mr. *Wills*; (e) the former declaring it to be “completely settled that, at least where there is proof *aliunde* of a *corpus delicti*, a full and free confession of the accused is sufficient, without any confirmation whatever, to warrant a conviction.” (f)

“In the United States,” observes Professor *Greenleaf*, “the prisoner’s confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his convic-

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(a) Mr. *Best* thinks that the cases of *Rex v. Faulkner* and *Bond*, (Russ. & R. C. C. 481,) and *Rex v. Tippet*, (*Id.* 509,) go the full length of establishing the rule in these terms; the confession being considered as serving as proof both of the *corpus delicti* and of the criminal agency of the accused. *Best* on Pres. § 257, p. 382; referring also to *Rex v. Wheeling*, 1 Leach C. C. 287, n., and *Rex v. Read*, *Id.* This appears also to have been the opinion of Mr. *Phillips*. 1 Phill. Evid. 400, 401; where *Rex v. Eldridge*, (R. & R. C. C. 441,) is also cited. See also 2 Russell on Crimes, 825, where the same cases are referred to. But, in a note to the last authority, in which the cases are examined, it is said, that “it does not appear that it has ever been expressly decided that the mere confession of a prisoner *alone*, and without any other evidence, is sufficient to warrant a conviction.” 2 Russ. on Cr. 825, (Phil. ed. 1853,) note (b). And in *Greenleaf* on Evidence, § 217, where the cases are reviewed, it is said that “in each of the English cases usually cited in favor of the sufficiency of this evidence, there was some corroborating circumstance.” The confusion seems to have arisen from a want of proper precision in the language employed in laying down the rule.

(b) *Rex v. Lambe*, 2 Leach, C. C. 552. *Rex v. Warickshall*, 1 *Id.* 222. *Rex v. Wheeling*, *Id.* 287, n. *Rex v. Read*, *Id.* *ibid.*

(c) *Heath*, J. in *Rex v. Fisher*, 1 Leach C. C. 286. But in Mr. *Best*’s opinion, “it is utterly impossible to support this ruling.” *Best* on Pres. § 257, p. 330.

(d) *Best* on Pres. *ubi supra*.

(e) *Wills*, *Circ. Evid.* 61.

(f) *Best* on Pres. *ubi supra*. And the rule is stated in the same terms, in *Wharton’s Am. Crim. Law*, 313, (ed. 1855.)

tion ; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases ; and it seems countenanced by approved writers on this branch of the law." (a) From this it might be inferred that a confession, *with* proof of a *corpus delicti*, was sufficient for a conviction ; and in some cases the rule is so laid down. (b) But in others, additional corroborating circumstances appear to be required. (c)

A cardinal rule on the subject of confessions, is, that the confession when made to a person having authority, such as a magistrate or officer, in order to be admissible, must be purely free and voluntary. (d) If it appear that any inducement has been held out, tending to extort a confession, either by intimidation or promise of favor, it cannot be received. (e) But if the inducement be held out by a person whose interference is altogether officious, the confessional statement will be receivable. (f) So, where the inducement is not of any temporal kind, as where the confession is made on the admonition of a clergyman. (g)

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(a) 1 Greenl. Evid. § 217.

(b) *The People v. Hennessey*, 15 Wendell, 147. *The People v. Badgley*, 16 Wendell, 53. *State v. Guild*, 5 Halsted, 185. In *The People v. Hennessey*, the rule, as stated in the reporter's abstract, seems to require not only proof of a *corpus delicti*, but of corroborating circumstances in addition. But the language of Chief Justice *Savage*, by whom the opinion of the court was delivered, clearly confines it to the former. See 15 Wendell, 153—155, where the English cases are reviewed.

(c) See *State v. Long*, 1 Haywood, 455; quoted in 3 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) Note 250, p. 416; and in Wharton's Am. Crim. Law, 313, (ed. 1855.) The last named author says of *State v. Guild*, (5 Halst. 185,) that "it stands alone in its character and result."

(d) 2 Stark. Evid. 48, 49. 1 Phill. Evid. 401. 1 Greenl. Evid. § 219. 2 Russell on Crimes, 826. Wharton's Am. Crim. Law, 316. Best on Pres. § 256.

(e) Wharton's Am. Crim. Law, 316, and the cases cited *ibid.* note 7. And see 3 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) Notes 254—264, pp. 423—433. See also *Hawkins v. The State*, 7 Missouri, 190. *Couley v. The State*, 12 Id. 462. *Robinson v. The State*, Id. 592.

(f) *Rex v. Taylor*, 8 Carr. & P. 733; cited in Best on Pres. § 256.

(g) *Rex v. Gilham*, R. & M. C. C 186. 2 Russell on Crimes, 848—852



But the self-criminative statements which properly fall under the denomination of *presumptive* evidence, are those which do not amount to direct or full confessions of guilt, but only authorize *inferences* more or less unfavorable to the innocence of the party making them. Sometimes, these statements occur in the form of responses to questions asked, sometimes they come from the party without question, and sometimes they occur in the form of questions asked by him.

In the last two descriptions of cases, they often possess a peculiar force and value, from the circumstance of their being not only purely voluntary and unsolicited, but uttered, also, without premeditation; and, on this account, they are free from the application and effect of many *infirmative* suppositions to which confessions of the direct kind are subject. It is true, that in most instances, they go merely to establish some collateral or intermediate fact, but they do so with the greatest possible force; and often point the way to inquiries which finally develop the whole truth of a transaction. A person making a *direct* and formal confession, does so upon reflection and consideration, and with a previously formed intention to criminate himself, whether the confession be true or false; and this deliberation, though tending to give greater weight to the confession, if true, affords opportunity, also, for the exercise of greater art and ingenuity, (in the invention of particulars and the skilful combination of them into a narrative,) if false. The language in which he speaks, he uses designedly, with a full knowledge and anticipation of its meaning and effect, and a full determination that it shall be understood as he uses it. But in the case of expressions which are only *indirectly* confessional, the intention of the party is just the reverse. He not only desires, but intends and endeavors to conceal his guilt; and abstains, as far as the state of his mind will allow, from any acts or words which may, even indirectly, betray

the consciousness he inwardly feels. But in one of those unguarded moments which sometimes occur, in spite of all that art and resolution can accomplish, and in which the truth is, by a sort of natural tendency, sure to be spoken, (a) he drops an expression, of the full force and ultimate effect of which he is not, at the time, aware; but which cannot, by any artifice, be recalled or unsaid.

An instance of a self-inculpativè expression uttered under circumstances like these, occurred in the language used by *Houseman*, the accomplice of *Eugene Aram*, while handling one of the bones of a human skeleton which had been disinterred near *Knaresborough*, and which has already been made the subject of remark under a former head. (b)

A signal instance of an expression, more directly criminative in its bearing, escaping from an accused party in the form of an *interrogation*, occurred in the case of *Commonwealth v. Webster*. (c) When the accused arrived at the jail, in care of the officers who had arrested him, upon being told that he was in custody for the murder of *Dr. Parkman*, he asked if they had found *Dr. Parkman*. The officer addressed declined to answer any questions; but the accused continued to speak, saying—"You might tell me something about it."—"Where did they find him?"—"Did they find the whole of the body?" It was very reasonably inferred from the last question, as was strongly urged on the trial, (d) that it could have been prompted by nothing but a guilty knowledge that the body of *Dr. Parkman* did not exist as a whole, but only in severed fragments. The dismembered condition of the body was one of the most secret facts of the case, and could not possibly have been known by any person who was not acquainted with the whole transaction. The accused would never have given utterance to this pregnant

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(a) *Wills, Circ. Evid.* 68.

(b) See *ante*, p. 468.

(c) *Bemis' Report*, 178.

(d) *Id* 449

inquiry, had he been entirely on his guard against everything wearing the complexion of confession ; but it was wrung from him, so to speak, in a moment of agony, when the dissembling power of the will, so long and so successfully exerted, was forced to give way to the natural utterance of the conscience and the heart.

Under the head of indirect confessions, are sometimes classed the acts of concealment, disguise, flight, and many other indications of mental emotion, (*a*) which have already received a distinct consideration.

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## SECTION XXVIII.

### *Demeanour during Trial.*

The last division of circumstances which may be considered as presenting grounds or materials of criminative evidence against an accused party, embraces those which are exhibited in the conduct and *demeanour* of such party when actually upon his *trial*.

These circumstances have not been formally noticed by any of the writers on evidence who have been most freely quoted in the course of the present work ; although they belong to that species of evidence the superior excellence of which is admitted to consist in the fact that it is presented directly to the senses of the tribunal, without any medium of testimony whatever. (*b*) And, although the examination of the accused himself, by a course of verbal interrogation, forms no part of the common law mode of procedure on trials for crimes ; there seems no reason why his conduct and

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(*a*) Wills, Circ. Evid. 70.

(*b*) 3 Benth. Jud. Evid. 249. Best on Pres. § 191. *Ante*, p. 214.

language, upon and after his arraignment, and while in the open view of his judges, should not be as legitimate a subject of observation and consideration as that of a witness on the stand. Much stress is laid, and deservedly, by the best writers on evidence, upon the manner and deportment of a witness, while delivering his testimony before the jury ; (a) and it is for the very purpose of affording an opportunity to observe the particulars of such manner and deportment, with the view of deducing from them conclusions favorable, or otherwise, to his sincerity, that the witness is made to come personally and testify orally before the tribunal. So the prisoner and the jury are brought face to face, that they may "look upon" each other, not from any views of idle curiosity, nor solely with reference to mere completeness of identification ; but that each may have the benefit of that natural kind of evidence which is afforded by the personal appearance and unrestricted observation of the other.

The demeanour of a person on trial for an alleged crime may be considered as necessarily exhibiting one of two general appearances or manifestations, namely,—the presence or the absence of visible *emotion*. But as the peculiarities of conduct, referable to the one or the other of these divisions, are found to vary constantly, according to the character of the individual who may become the subject of observation, and as they are, in themselves, confessedly liable to be produced by causes unconnected with any actual sense of guilt, they do not, within certain limits, furnish adequate materials for extracting any general rule of inference, of much practical value to a tribunal. The following particulars, however, may be worthy of some attention.

The first thing which may be supposed desirable to be ascertained in these cases, is, whether the outward demeanour, which is the subject of observation, is, in fact, a faithful reflection and representation of the actual internal state ;—

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(a) 1 Stark. Evid. 457—459.

whether the party is behaving naturally, or the reverse ; whether he is acting a part, or exhibiting himself in his own genuine character. It is certain that manner is often assumed, by the innocent as well as the guilty ; though from different motives, as well as in different degrees. The most innocent will struggle to maintain composure under the terribly exciting circumstances of a public and outwardly degrading exhibition of himself, from a commendable sense of self-respect. The guilty will counterfeit calmness from a belief (which seems to be current in the vulgar mind,) that the manifestation of any degree of emotion is, so far, an admission of guilt ; and, in order to avoid any tendency in this direction, the manner is sometimes pushed so far in the opposite, as to assume the aspect of unnatural gaiety or callous indifference.

Emotion, on the other hand, especially in any extreme degree, is much more rarely, if ever, counterfeited or assumed on these occasions. If exhibited at all, it is almost sure to be a genuine manifestation. And that it should be exhibited, and visibly, in some degree, is what is looked for as a natural consequence of the position of the accused, even by those who may be confirmed in the belief of the entire falsity of the charge against him. But the emotion, which may be thus felt and evinced by an innocent person, is, nevertheless, (as just observed,) usually restrained within decorous limits, as well from a sense of self-respect, as from the inward and self-sustaining power admitted to belong to a consciousness of innocence.

Supposing it clearly ascertained that the manner is assumed, and that the calmness exhibited, or attempted to be exhibited, is not in fact felt, it does not necessarily amount to an unfavourable circumstance against the accused, where there is nothing in the manner itself of an offensive or grossly unnatural character. But where it takes the coarse, forced and obtrusive shapes sometimes assumed by parties

accused of the highest crimes, it may well be considered as affording grounds for unfavorable inferences. Supposing, on the other hand, the demeanour to be a true representation of the state of the mind, there is usually not much difficulty in distinguishing between the respectful composure which may be supposed to be characteristic of innocence, and the gross, reckless, and sometimes brutal bearing of guilt.

If any thing, approaching the character of a general proposition, were to be laid down as a result of actual observation upon this subject, it would seem to be this ;—that *restrained emotion*, under the circumstances of a public trial, is the natural and usual attitude and deportment of innocence ; while the evidences of guilt are to be sought near the two *extremes* of overpowering agitation and total callousness. So constantly, however, is demeanour liable to be affected by peculiarities of character and temperament, not necessarily connected with moral delinquency, that even such a rule as this would be found to be subject to more or less exception in its application.

But, beyond the limits which have hitherto been kept in view, the demeanour of a prisoner on trial may, with far less reservation, be admitted into the number of those circumstances which go to make up, in the whole, a satisfactory impression of his guilt. Thus, an openly audacious, defiant, and insolent bearing towards the court itself, exhibited either in stubborn refusal to comply with the ordinary solemnities of the trial, or in indecent interruptions of the proceedings, or in disrespectful remarks addressed to the court or jury, or in denunciations and threats uttered against the witnesses or counsel for the prosecution, will scarcely admit of any other than an unfavorable interpretation. It exhibits the natural action of a depraved and reckless mind, exasperated at being held in the grasp of justice, and determined to offer every sort of impediment to the progress of investigation and the development of truth. The truly inno-

cent, however keen may be his sense of wrong and oppression, in view of the humiliating position which he is forced to occupy before his fellow men, is never found to array himself in this open and insolent hostility to the course of justice, in the very seat of judgment.

But it is to be further observed, that, whatever be the inclination of the mind from which these unfavorable manifestations are found to proceed, they are usually kept under restraint while in the presence of the court, and until the great pending question is settled by the rendition of the verdict. This brings us to consider certain instances of demeanour *out of court*, and *after verdict*, when these restraints are removed, which, though not capable of being presented in any form of *judicial* evidence, enter, nevertheless, like confessions at the place of execution, into the general mass of facts which serve to confirm any intelligent observer in the opinion of the guilt of the accused. With one or two of the worst of these examples, the catalogue of criminative circumstances, which has so long occupied our attention, will now be finally brought to a close.

*Rush's* case (*a*) may be selected as an instance of outrageous behaviour, on the part of an arraigned prisoner, reaching to the length of absolute ferocity. During the night after the evidence for the crown was concluded, the prisoner's conduct was violent and ferocious in the extreme. He vowed revenge against the witnesses who had given evidence against him; and such were his threats and conduct, that it was feared he might lay violent hands on his own life, or attack any one within reach, if the means were placed in his power. So that, on his being brought into court, the next day, extraordinary precautions were taken to remove any objects that might be converted into means of mischief. (*a*)

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(*a*) *Regina v. Rush*; reported in Burke's Celebrated Trials, connected with the Upper Classes, 458—520, under the title of "The Stanfield Hall murders."

(*b*) The reporters were actually requested by the governor of the gaol, to

But even this case, prominent as it stands in its kind, falls far short of exhibiting the full length to which the ferocious passions of revenge and despair are capable of urging the mind over which they have obtained the mastery. There was no excess actually committed by the prisoner, before the court. For an example of the extreme class, where the sanctities of the court-room were openly defied and profaned, in one attempted and another actual murder, in the very presence of the judge and jury, we must refer, in conclusion, to an American case of a date as recent as 1853;—the North Carolina case of the *State v. Carawan*. (a) In this case, there appears to have been no previous exhibition of physical excitement and violence; no angry utterance of denunciations or threats; nor any visible indication of a malignant design: but the criminal cherished his terrible purpose in secrecy and silence, until the moment after the verdict of guilty was recorded; when, suddenly drawing a pistol from his bosom, he fired at one of the leading counsel for the prosecution, (though, happily without effect,) and then drawing another, *blew out his own brains*, in the prisoner's box; the sheriff vainly attempting to stay his hand. (b)

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keep their pen-knives out of the prisoner's reach. And the rows of small iron spikes, at the rear of the dock, and across the narrow passage between it and the body of the court, were covered over with stout pieces of wood fastened down over the points, so as to render the spikes useless in any attempts which the prisoner might make on himself or others. *Burke's Trials*, 501.

(a) Superior Court of Law of Beaufort County, North Carolina, Fall Term 1853.

(b) This most extraordinary scene is graphically described in the following extract from the pamphlet report of the trial.

“The clerk entered the verdict, and then said to the jury; ‘Gentlemen of the jury, hearken to your verdict, as the court has recorded it. You say that *George Washington Carawan* is guilty of the felony and murder whereof he stands indicted. So say you all.’

While the clerk was reading the verdict to the jury, the prisoner, who still looked calm, was observed, with great deliberation, to unbutton his vest, and open his shirt-bosom; but his countenance betraying no evil purpose, the movement excited no suspicion.

His Honor, turning to the jury, remarked; ‘Gentlemen of the jury, you are



## SECTION XXIX.

*Exculpatory Circumstantial Evidence, and its materials; including the Informative Circumstances and considerations applicable to Criminative Evidence.*

We have, thus far, considered the principal facts or circumstances which are found to occur in criminal cases, and may be used in evidence for the purpose of establishing charges of guilt. In other words, we have endeavored to present the elements or materials of circumstantial evidence, as it may be employed in behalf of the *prosecution*, on a criminal trial.

We are next to consider that division of facts or circumstances which may be used as materials of *exculpatory* evidence; or that kind of evidence of which an accused party

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discharged.' Then, turning from the jury to the bar, he said; 'The court will take a recess of one hour.'

At this moment, the prisoner drew a single-barrelled, self-cocking pistol from his bosom, rose from his seat in a half-standing posture, leaned forward, thrusting his arm between the heads of Messrs. *Bryan* and *Satterthwaite*, took deliberate aim at Mr. *Warren*, (who, with Mr. Solicitor *Stevenson*, was standing six feet in front of him,) and fired. The ball struck just above the heart, and passing through the lappel of his coat and cutting the cloth on the breast, struck the padding and fell to the floor.

The prisoner dropped this pistol, and instantly taking another, applied it to his temple. Mr. *Joseph J. Hinton*, deputy-sheriff, observing the movement, seized his arm, and pulled it down to the railing of the box, but could get it no further. During this struggle, the prisoner, with great coolness, leaned his head against the muzzle of the pistol and fired; the ball entering the right side of the skull, considerably behind and somewhat above the ear, and traversing the brain until it lodged just over the left eye. The prisoner dropped on his seat in the prisoner's box, with his right arm hanging over the railing, and his head fallen upon his bosom, bleeding profusely.

His Honor left the bench, and the jury their seats, every thing being in the wildest confusion." Pamphlet Report, 115.

is always entitled to avail himself, by way of *defence* against a criminal charge.

These facts or circumstances will be found, on examination, to be of two principal kinds: first, facts or circumstances actually *proved*; and, secondly, facts or circumstances *not proved* nor requiring to be proved, but such as may be supposed to have existed; being in the nature of reasonable probabilities or possibilities, to the benefit of which, under certain conditions of the criminative facts, an accused is always entitled.

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### SECTION XXX.

#### *Exculpatory Facts or circumstances, actually Proved.*

Exculpatory facts of this class may be made to appear, either from evidence expressly adduced on the part of the defence, for the purpose; or from the evidence adduced on the part of the prosecution, either as it stands delivered by the witnesses on that side, or as it is qualified by their cross-examination. In regard to their effect as evidence, they may be divided into three principal classes: first, such as go to show the insufficiency of the evidence to prove the criminative facts alleged and relied on; secondly, such as go to disprove or overthrow the criminative facts proved; and, thirdly, such as go to avoid the effect of the criminative facts proved, by explanations consistent with the truth of their existence.

#### *I. Exculpatory Facts, going to show the insufficiency of the criminative evidence adduced.*

An accused party is always at liberty to take the preliminary and fundamental ground, that the facts relied on by the

prosecutor, and contended to have been proved by his witnesses, have not, in reality, been made to appear; the *sufficiency* of the *medium* of the evidence being the point on which it is assailed. Thus, if he can show, to the satisfaction of the jury, from a course of cross-examination or otherwise, that the witness' means and opportunities of knowing the facts to which he has testified, were, in reality imperfect; or that his impressions of such facts were in themselves indistinct; or that his general capacity of accurate observation and remembrance was and is limited or defective; (a) it will afford a ground for the inference that the witness may have been mistaken, or was probably mistaken, in his impressions of the facts, as he has represented them. Accordingly, where a witness has testified that he saw an object, or heard a sound, about the time and near the place at which the supposed crime was committed; or that he heard the accused himself utter certain expressions, (such as declarations of intention or threats, before a crime, or confessional statements after it;) or that he saw him in a certain situation, about the time of its commission; the accused may show either that the witness' sense of sight or hearing was, in itself, defective; or that the attending circumstances were such that he could not have seen or heard distinctly and accurately. (b) Where the *identity* of the accused comes in question, such exculpatory evidence is of the greatest importance. So, he may assail, not only the ability, but the integrity of the witness, with the same general view. Both these courses are constantly pursued, in cases of direct as well as circumstantial evidence.

II. *Exculpatory Facts, going to disprove or overthrow the criminative facts proved.*

Supposing the criminative facts alleged and claimed to be proved, unassailable on any of the preliminary grounds just

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(a) See 1 Stark. Evid. 459—461.

(b) See *Id.* 460—463.

mentioned, the accused may relieve himself from their effect as evidence, by proving one or more facts or circumstances of an *opposite* character or leading to *opposite* results. And the facts or circumstances which may be used for this purpose, may be subdivided into two classes: those which lead to *necessary* inferences; and those which lead to *probable* inferences.

1. *Exculpatory facts, leading to necessary inferences.*

If, in answer to a criminal charge, whether supported by direct or circumstantial evidence, the accused can affirmatively show but a single circumstance leading to the necessary inference that the crime charged *could not possibly* have been committed by him, it will be sufficient to overthrow the whole accusation, however clearly it may have otherwise been established. A strong case of this kind is mentioned by Sir *Matthew Hale*, as having occurred on a trial before himself, in the county of Sussex. A man, described in the learned judge's own words as "an ancient wealthy man of about sixty-three years old," was indicted for a rape which was fully sworn against him by a young girl, of fourteen years old, and a concurrent testimony of her mother and father, and some other relations. The defence set up by the accused was, that a bodily infirmity to which he had been subject for upwards of seven years, rendered the commission of the crime by him a physical impossibility: and, upon a private examination of his person by the jury, they were so satisfied of the truth of the defence, that they at once acquitted him. (a)

*Alibi Evidence.*

Again, if the accused can make it appear, that, at the very time when the crime charged is alleged to have been committed, (it being of a nature to require his personal

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(a) 1 Hale's P. C. c. 58. p. 685.

presence,) he was *in another place*, a result of the same kind will be established; founded on the obvious impossibility that the same person could have been in two different places at the same time. This species of defence, familiarly known as an *alibi*, is so constantly resorted to, on trials for crimes, as to call for a somewhat extended notice under the present head.

A leading rule in the application of this description of evidence, is, that the time relied on, and in which the value of the evidence essentially consists, must *correspond closely* with the time at or during which the offence is proved to have been committed.) Where such time has been fixed to a particular day, hour and minute, if the accused can show that, at that same particular hour and minute, he was elsewhere, the consequence is clear, without the help of any process of reasoning. The fact of his presence at the scene of crime is incredible on its face, and incredible *in toto*; (a) and hence the conclusion is strictly unavoidable and necessary, that he could not possibly have committed the offence charged.

But the proof, on the part of the prosecution, is rarely made, or capable of being made, to this degree of exactness. A space between two consecutive hours is the nearest approach to it that is ordinarily practicable; and sometimes, all that can be proved is that the crime was committed, or must have been committed, during a space of time embracing several hours: as, during a night or part of a night, or during a forenoon. In such cases, the *alibi* evidence relied on, in order to be effectual, must be applied to and cover the *whole* of such period. (b) A good illustration of this position is presented in *Richardson's* case. (c) It was satisfactorily proved, in that case, that the crime had been com-

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(a) 8 Benth. Jud. Evid. 875.

(b) Wills, Circ. Evid. 188.

(c) *Ante*, p. 244, 245.

mitted during the forenoon of the day specified. To meet this, the prisoner adduced evidence to show that, during that same forenoon, he was engaged at work, with his fellow-servants, at some distance from the cottage which was the scene of the crime. Here was a seemingly entire correspondence between the two facts, in the important particular of time; bringing the facts themselves in direct opposition to each other. But, on a closer scrutiny of all the circumstances, it was found that the accused had not been in company with his fellow-workmen, during *the whole* of the forenoon in question; but that there was an *interval* of about *half an hour*, during which he had *absented* himself from them. This apparently short interval served to destroy the effect of the whole evidence. For it was satisfactorily shown that it was long enough to have admitted of his going to the cottage, committing the crime and returning to his companions; and this was subsequently proved to have been the actual fact, by the prisoner's own confession. So, in a case where an arson had been committed at night, the prisoners offered to prove that they were in bed at twelve o'clock, and were found in bed the next morning. But, it appearing that the distance to the scene of crime was only two miles, so that they might have risen, committed the deed and returned to bed, the defence was disregarded. (a) In other words, the accused, in such cases, must account for himself during the whole of the period to which the evidence is applied. If there be an interval unaccounted for, and it is found that he might have committed the crime during that interval, the evidence is deprived of the whole quality in which its characteristic efficacy consists, and consequently goes for nothing.

Where the time proved as that of the commission of the crime, and that shown by the *alibi* evidence, are not identical, but only proximate to each other, the inference dedu-

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(a) *Rex v. Fraser*, Alison's Princ. 625. Wills, Circ. Evid. 138.

cible from a view of both periods in connection, is not always one of necessity and certainty, rendering the fact of the party's presence at the scene of crime, incredible under any circumstances, or incredible *in toto*; but often one of improbability, more or less strong, rendering the fact of presence incredible in degree only, and according to circumstances. (a) The evidence on both sides, taken together, does not represent the party as having been in both places at once, but only as having been, at the one time, in the one place, and, at the other time in the other. And the question to be considered is, whether the degree of rapidity with which he is required to have passed from one place to the other, be credible under all the circumstances of the case. (b)

(The two circumstances, the aid of which is indispensable in determining this question,—whether it were actually and physically impossible, and therefore at once incredible, that the party was, or could have been, at both places, consecutively,—are, the *distance* between the two places, and the *rapidity* with which the party could have moved from one to the other. (c) The interval between the two periods of time may be so short, and the distance in space comparatively so long, as to render the inference of impossibility as necessary a one, and as immediately perceptible, as if the two periods had been identical. In other cases, the facts merely raise a question of more or less easy solution. Sometimes, this question is one of such nicety, as to require so minute a circumstance as a difference in time-pieces, to be carefully taken into view.) (d)

“The credibility of an *alibi*,” observes a learned writer,

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(a) 3 Benth. Jud. Evid. 375.

(b) *Id. Ibid.*

(c) See what was said under the head of concomitant circumstances, *ante*, pp. 384—387.

(d) See *Cowper's case*, (18 State Trials, 1113, 1114;) *Thornton's case*, (Celebrated Trials, 99, 102;) the *State v. Avery*, before the Supreme Court of Rhode Island, May, 1838.

“is greatly strengthened, if it be set up at the moment when the accusation is first made, and consistently maintained throughout the subsequent proceedings. On the other hand, it is a material circumstance to lessen the weight of a defence of this kind, if it be not resorted to, until some time after the charge has been made; or if, having been once resorted to, a different and inconsistent defence is afterwards set up.” (a)

But the defence of an *alibi*, though in itself most reasonable and just, it being sometimes the only defence which an innocent person can make against an unfounded charge, (b) is liable to an objection, the truth and force of which have been exemplified in so many actual instances, as to occasion it to be viewed with peculiar suspicion and distrust. This objection consists in its great liability to abuse, growing out of the ease with which it may be fabricated and sustained by false testimony, and the difficulty with which such fraud and perjury are detected. (c)

There are two principal ways in which the fabrication of this species of defence is found to be effected. First, it is effected by *collusion* and concert between the accused, or some one acting in his behalf, and one or more individuals, who, “for the sake of hire, or an unrighteous friendship,” (d) profess themselves willing and ready to testify to the necessary fact, though actually false, and known to be so; and who accordingly venture upon the course of direct and wilful *perjury*. (e) Secondly, it is effected by inducing

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(a) Wills, Circ. Evid. 188.

(b) Foster's Crown Law, p. 868.

(c) See the observations of Cowen, J. in *The People v. Rathbun*, 21 Wendell, 509, 519.

(d) 8 Benth. Jud. Evid. 879.

(e) A case is reported, where a gentleman was robbed, and swore positively to the prisoner, who, nevertheless, was acquitted; the completest *alibi* being proved. About a year afterwards, the prisoner confessed to the prosecutor that he had committed the robbery, and that the *alibi* was concerted. London Med. Gazette, vol. viii., p. 86. Wharton's Am. Crim. Law, 883.



X ) a person who is found to have *honestly* and innocently received an *erroneous* impression, to state such impression as a fact, in the character of a witness under oath. The former of these courses will require no explanation; the latter may be made the subject of a few additional remarks.

The falsity of an impression which may have been innocently produced on the mind of an individual professing his willingness to testify to the fact of an *alibi* on the part of the accused, or actually brought forward for that purpose, may regard one or more of the three essential particulars of which the evidence always consists: namely, the *person* of the accused; the *time*, or duration of the time, of his alleged presence at the place designated; and the *place* itself.

First; the proposed witness may be mistaken as to the individual whom he alleges he saw (*a*) at the time and place in question, being misled by resemblances which often deceive an observer, or by the insufficiency of the light under which, or the shortness of the interval during which the observation was made. (*b*) But this source of error would,

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(*a*) The impression that a particular accused individual was present at a particular place and time, is sometimes merely an *inference* from observed facts, and not the result of actual view of his person. An erroneous impression created in this indirect way, was taken advantage of by the accused, in the case of Major *Strangways*, A. D. 1857; a case the more remarkable, as the defence of a false *alibi*, through means of this kind, had been fixed upon by the accused, before the commission of the crime; and was actually fabricated by himself, in advance, by laying a train of circumstances on purpose to produce the false impression desired. The artifice used has already been alluded to. He prevailed upon a friend, whom he introduced clandestinely into his chamber, to personate him, during his absence, by walking about the room, so as to be *heard* of all the family; thereby inducing them to suppose that he himself was actually present in the apartment. And the contrivance was so far successful, that they testified to such presence, as a fact, before the magistrate. 5 London Legal Observer, 90, 92.

(*b*) As to the liability to mistake, in matters of personal identity, see the subject of identification, *post*. The identity of the individual, supposed to have been the accused, who was sworn to have been seen near the scene of the crime, shortly before the time of its commission, and also previously, going in

of course, be excluded in cases where the accused was well known to the observer, and in his actual company, especially for a considerable period.

( Secondly, the witness may be mistaken as to the fundamental particular of *time*; and this perhaps presents the most frequent and fruitful source of erroneous impressions. It has already been mentioned, (a) as a result of general observation, that men neither note nor measure time with much precision, in connection with any occurrence they may incidentally witness, particularly where it does not concern their own affairs, even where the occurrence itself is observed with some minuteness. The impossibility, to most persons, of doing this without the aid of a time-piece, will be conceded. But, supposing the particular hour and minute of the day or night, at which the witness saw the accused at a place designated, accurately stated and (what is of equal importance,) correctly remembered, it may happen, especially after a considerable lapse of time, that the day itself may come to be mistaken for another, as by being confounded with the day immediately preceding or following; a circumstance which often happens in the recollection of ordinary events. (b) This assignment of the occurrence of events, true in themselves, to a *wrong day*, has been mentioned as an expedient sometimes resorted to, for giving effect to a defence of *alibi* which has been wholly fabricated. (c)

Mistakes as to the *place* where the accused was seen, or is supposed to have been seen, are much more rare; though easily possible, under peculiar circumstances.

( In consequence of this liability to perversion, mistake and a direction towards it, became a very important point in the case of *The State v. Avery*, and was made the subject of much testimony on both sides.

(a) *Ante*, p. 102.

(b) In common life, it often happens that the *hour* of a day when an occurrence took place, is more accurately remembered than the *day* itself.

(c) *Wills, Circ. Evid.* 83.

abuse, it has come to be generally conceded that *alibi* evidence is to be received with uncommon caution. (a) It is, indeed, hardly questionable, that a defence which, where it is allowed to prevail, is so summary and overwhelming in its effect,—operating, by means of a single fact, sometimes sworn to by a single witness, to destroy the effect of a combination of facts, testified to by a number of witnesses, and constituting (but for such *alibi*,) a reasonably convincing body of evidence,—should be required to be established in the clearest manner, and by witnesses of unexceptionable character. In cases where it is founded in honest mistake, such mistake may sometimes be detected and shown by a judicious course of cross-examination; and an important point to be always ascertained is, whether the witness' statement, as to the person, time or place sworn to, be derived from positive knowledge of the fact, (as by having observed, at the time, the particular day and hour, in its immediate connection with the person seen, and by having retained it continuously in memory, afterwards;) or be only the result of comparison with other circumstances, and of inference from them, by means of remembrances subsequently called up. (b) But where the defence has been fabricated, in the worst sense, or with an express fraudulent intent, and resolutely maintained by a skilful concert among several,

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(a) Foster's Crown Law, 368. 2 MacNally's Evid. 467.

(b) The *day* of an *alibi* is often stated by a witness, in this way of comparison and inference. In the English case of *Hawkins* and *Simpson*, who were indicted for robbing the mail on the 16th of April, 1722, *Hawkins*, in his defence set up an *alibi*; to prove which, he called one *Fuller*, who deposed that *Hawkins* came to his house on Sunday the 15th of April, and lay there that night, and did not go out until the next morning. (The robbery was committed about two o'clock on the morning of the 16th.) Being asked by the court, how he came to remember that it was the 15th of April, the witness referred to a receipt, (which was produced in court,) which he had given *Hawkins* at his house on the 10th of April, and said that he very well remembered that *Hawkins* lay at his house the Sunday night following. The prisoners, however, were convicted and executed. Theory of Presumptive Proof, Appendix, Case 9.

there is rarely any adequate means of exposing its real character. Direct impeachment of the veracity of the witnesses, though seldom practicable, is the only effectual expedient that can be resorted to; (a) and, in some recorded cases, it has been employed with effect. (b) There are several instances, however, in which *alibi* evidence, though given in the most positive terms, has been wholly disregarded by the jury, in the exercise of their right to disbelieve the witness, even where his character has not been formally impeached. (c) The propriety of rigorously sifting this species of evidence has been well illustrated by Mr. *Bentham*; and there is much truth in his observation that the escaping by evidence of this kind, when unsifted and unexamined, never fails to leave a stain on a man's character, which a thorough discussion would effectually wash out. (d)

"An unsuccessful attempt to establish an *alibi*," observes Mr. *Wills*, "is always a circumstance of great weight against a prisoner, because the resort to that kind of defence implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them, if they remain uncontradicted." (e)

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(a) Inquiry into the characters of the witnesses, is the great remedy recommended by Mr. *Bentham* for the abuses which he considers inseparable from the allowance of *alibi* evidence. 3 *Jud. Evid.* 376—379. See his suggestions of various methods of obtaining opportunities for making such inquiries, *Id. ib.*

(b) See *Harrison's* case, (12 *State Trials*, 838, 855, 856, 861, 862, 863,) in which two of the principal witnesses, who swore positively to the fact of an *alibi*, were proved to be keepers of a house of ill-fame, and another to have been convicted of cheating and forgery.

(c) See the case of *Bishop, Williams, and May*, 2 *London Legal Observer*, (Monthly,) 81. In *Coleman's* case, in which the prisoner was convicted and executed, but his innocence subsequently established, an *alibi* was proved, but the evidence was not credited by the jury. 5 *London Legal Observer*, 330.

(d) 3 *Benth. Jud. Evid.* 379. A prominent American case, in which an *alibi* was made a principal ground of defence, and in which the prisoner was acquitted, was that of *The People v. Richard P. Robinson*, tried at the New York Oyer and Terminer, June, 1836.

(e) *Wills*, *Circ. Evid.* 83

The subject-matter of the defence of an *alibi* is most commonly the person of the *accused*. But it may also be the person of the individual upon whom the crime has been committed, (a) as of the *deceased*, in a case of homicide or murder. A marked instance of the use of *alibi* evidence, in the latter and more unusual form, occurred in the case of *Commonwealth v. Webster*; (b) which may also be referred to, as a case of *alibi* evidence, supported by the testimony of several witnesses, and yet founded in entire though honest mistake.

2. *Exculpatory facts, leading to probable inferences.*

In the next place, an accused party may take advantage of all such facts, (either proved by his own witnesses, or appearing or extracted from the testimony of the prosecutor's witnesses,) as, though not leading to the necessary inferences demanded by circumstances of the class just mentioned, induce presumptions of greater or less strength, in behalf of the defence, tending to repel, or neutralize, or at least to weaken the force of the presumptions derived from the evidence for the prosecution. The basis of the presumption in this, as in the preceding class of facts, is the *inconsistency* of the exculpatory with the inculpatory facts proved; not a total and certain or manifest inconsistency, commanding assent to its truth, but a partial and probable inconsistency, commending itself to the judgment, as a matter to be carefully weighed and considered.

Under this head, the following further sub-divisions of exculpatory facts may be made:—particular *physical* facts; particular facts of *conduct*; and the *general* fact of conduct,

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(a) See 3 Benth. Jud. Evid. 376. And it may take a still wider range, comprehending persons in general, and even things *Id. ibid.*

(b) Bemis' Report, 262, 267, 269, 271, 272, 273. See the observation of Chief Justice Shaw, as to the application of the term *alibi*, in this instance. *Id.* 475.

as a habit or quality of the accused, or, in other words, his moral *character*.

(1) *Particular physical facts.*

A single physical fact, affirmatively proved, may serve to destroy, or at least to weaken the force of an otherwise convincing body of criminative evidence. In a case in England, where a man was tried for murder, by shooting, under very suspicious circumstances, the presumption against him was greatly weakened, if not entirely destroyed by the circumstance that six shots, extracted from the brain of the deceased, all corresponded in weight with the shot known as No. 3; while the shot in the prisoner's bag contained a mixture of No. 2. and 3; and the charge in the gun was found to contain the same mixture. (a)

And it may be observed, in general, that whenever *physical* coincidences are relied on for the prosecution, it is important that they should be closely examined, and rigidly verified; as they may turn out to be apparent merely, and not real.

(2) *Particular facts of conduct. (b)*

There are a few prominent circumstances, which so constantly exhibit themselves as natural qualities of criminal conduct, that where they do not appear in evidence, or where their opposites are proved to have existed, they serve to establish a moral inconsistency with the criminative facts proved, leading to presumptions of greater or less strength in favor of the accused. Under this head, may be enumerated the following:—acts serving to indicate a *motive* or inducing cause to the commission of the crime charged;

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(a) *Rex v. Whittall*, Liverpool Spring Assizes, 1839. Wills, Circ. Evid. 180.

(b) These are, in many respects, identical with what were termed, on a previous page, *moral* circumstances.

*secrecy* of movement, while preparing to commit the crime or during the act of commission ; avoidance of mischief or danger to the criminal's own person ; *concealment* or *flight* after the commission of the crime ; and *emotion* on being arrested, or charged with having committed it. If the circumstances show the existence of a strong motive to deter from the commission of the crime ; or if it can be proved that the accused did not avoid observation, when seen near the scene of the crime ; or actually suffered in his own person from what was considered the criminal act ; or did not conceal his own person, or the physical objects or appearances which are regarded as evidences of the crime ; or did not fly from the scene of the crime ; (a) or did not, when overtaken and interrogated or accused, betray any emotion that could be referred to a guilty motive or consciousness :— all these facts serve to establish conclusions more or less inconsistent with the supposition of his guilt, according to the case. (b) Thus, if, on a trial for arson with intent to defraud an insurance office, it be proved, on the part of the prisoner, that he had goods on the premises burned, worth more than the amount of his insurance, such proof will be evidence of a strong counteracting motive ; it being obviously for his interest that the property should not be destroyed. (c) So, where a person, accused of murdering another, is shown to have had a direct interest in the continuance of the life of the deceased, a similar counteracting motive will be indicated. (d) So, if, on an indictment for murder by poisoning, it is proved that the prisoner herself had partaken of the poisoned food, and had become ill, in consequence, it furnishes a ground of favorable presumption

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(a) But see the decision in *The People v. Rathbun*, 21 Wendell, 509.

(b) But they are, nevertheless, to be always taken subject to the well ascertained general fact of the intrinsic *inconsistency* of criminal conduct with itself. More will be said on this subject hereafter.

(c) *Rex v. Bingham*, Horsham Spring Assizes, 1811 ; Wills, Circ. Evid 125.

(d) *Rex v. Downing*, Salop Summer Assizes, 1822 ; Wills, Circ. Evid. 137, 138

in her behalf. (*a*) So, in a case, already cited, (*b*) where one of two travellers who had put up at an inn, was murdered by stabbing during the night, and robbed of his money; and the other, having left the inn early the next morning, and being from that circumstance suspected, was pursued and overtaken, and his sword, on being drawn, was found bloody; the innocence of his countenance and behaviour, when he was apprehended,—his not deviating from the direct road to the place which he, over night, described himself to be travelling to,—and the money taken not being found about him:—all these were so many exculpatory circumstances, tending to weaken the presumptions derived from the criminative ones. And they were fully confirmed as true, by the subsequent confession of the inn-keeper, that he himself was the real murderer. (*c*)

In cases of charges of passing counterfeit money, the facts of receiving the bills as good, in the regular course of business, (*d*) and passing the note to an acquaintance, and giving a true statement of the prisoner's business, (*e*) have been considered as favorable to the prisoner. In charges of knowingly receiving stolen goods, the following circumstances have been recognized as favorable to the prisoner:—going, in the day-time, to a store but a few doors from the store which had been robbed, and leaving the goods there, for sale; saying that he had more of the same kind of goods; saying that he would be present at an auction sale of the goods; leaving the original marks on most of the goods; and on being arrested, aiding in the arrest of the thief, who, on examination, refused to answer. (*f*) And

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(*a*) *Regina v. Hawkins*, Stafford Summer Assizes, 1889; Wills, 125.

(*b*) *Ante*, p 126, note.

(*c*) Brackenridge's Law Miscellanies, 507.

(*d*) *The People v. O'Bryan*, 1 Wheeler's Crim. Cases, 21.

(*e*) *The People v. Quackenboss*, 1 Wheeler's Crim Cases, 91, 93. But, in this case, the criminative facts were very strong; and the prisoner escaped on a defect in the indictment. *Id.* 93, 94.

(*f*) *The People v. Cochrane*, 1 Wheeler's Crim. Cases, 81, 84.



the following may be added:—part of the goods being found in the prisoner's store, open to the view of those who called in; a number of letters, written with a pen on the bottom of a dressing-box, (by which the owner was enabled to identify it,) being suffered to remain; with good character as to honesty. (a)

But an accused party is not always confined to facts derived from *his own* conduct, or illustrative of his own conduct or motives, but may sometimes avail himself of facts of conduct on the part of the party claiming to have been injured. Thus, in cases of alleged rape, if it appear that the female concealed the injury for any considerable time after she had opportunity to complain; or if, in the words of Sir *Matthew Hale*, “the place where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned.” (b)

(3.) *General or habitual fact of conduct, constituting moral character.*

An accused party is not only allowed to avail himself of the inferences deducible from *particular* facts of conduct, connected with the case under investigation, but is entitled to prove the *general* or habitual tenor or quality of his conduct, so far as it may be applicable to the particular case; or, in other words, to prove the possession of such a moral *character*, as to raise a presumption in his behalf, to meet the general affirmative presumption of his guilt.

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(a) *The People v. Teal*, 1 Wheeler's Crim. Cases, 199, 201. But in this case, the criminative facts were so strong that the prisoner was found guilty.

(b) 1 Hale's P. C. ch. 58, p. 688.

“Character evidence,” according to Mr. *Bentham*, “has this in common with *alibi* evidence; that it is, with the utmost facility and clearness, distinguishable from every other species of evidence.” (a) The frequency with which it is resorted to, as a means of defence against criminal charges of all kinds, from the highest to the lowest, entitles it to receive a somewhat particular notice, under the present head.

The term “character” itself, it may be observed, is here taken in a limited sense. By the *character* of an individual, with the further designation of *good* or *bad*, is ordinarily understood an assemblage of *various* moral qualities, which are observed and known to be habitually manifested by him, in his intercourse with others, and which stamp him, as it were, with a particular designation or distinctive mark, (b) exhibiting *all* that he is, morally. It has also the sense of *reputation*, into which, as we shall presently see, character, in the language of evidence, is constantly resolvable.

In extraordinary cases, as where the crime charged is of an atrocious description, and the moral character of the accused of a high grade in every respect, it may be advisable or necessary to present it in this degree of fullness; especially where the object is to show that no motive to the commission of the crime could possibly have existed; the possession of each moral quality shown, and especially of all combined, serving to raise a general presumption of innocence in respect to criminal charges of *every* kind. And sometimes a still wider range may be taken, embracing the circumstances of mental endowments or attainments, and station, or social and professional position, in the general mass of considerations tending to create a presumption of innocence. (c)

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(a) 3 Jud. Evid. 202.

(b) This is the radical meaning of the word.

(c) See *ante*, pp. 323—325.

But character, as it is allowed to be set up in the defensive way already mentioned, is rarely exhibited, or required to be exhibited, in any such breadth and fullness as this. In most cases, it is resolvable into some *particular* moral quality, the possession of which, as a general fact, is known from observation, to lead to courses of conduct, the opposites of that involved in the particular crime charged; and the possession of which, in the particular case, as shown by habitual outward conduct, is therefore put forward as most likely to render the truth of such a charge improbable:—for example, honesty, to meet a charge of theft; chastity, to meet a charge of rape; and gentleness, to meet a charge of violent or riotous assault. In this limited sense of the term “character,” (a) such an adaptation of the evidence to the case, is, indeed, indispensable. On a charge of theft, it would be obviously irrelevant and absurd to adduce evidence of a humane disposition, with the view of relying upon it to rebut the charge. And the rules of evidence are in strict accordance with this view. (b)

The true foundation of these qualities undoubtedly consists in the presence and habitual operation of virtuous *principles*, which are voluntarily entertained, and observed

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(a) Character, considered as a ground of defence in the law of evidence, is constantly designated by the term “general,” as distinguished from “particular.” “The inquiry must be made with reference to the *general character* of the prisoner, for it is *general character alone* which can afford any test of general conduct,” &c. 2 Russell on Crimes, 784. 1 Phill. Evid. 469, 470. 2 Stark. Ev. 866. *Particular* acts of conduct are not, ordinarily, allowed to be given in evidence. *Id. ib.* Wharton’s Am. Crim. Law, 293. (ed. 1855.) But in another sense, it is not general, but particular character, as explained in the text, and it is so expressly designated. “In such case, the character sought to be proved *must not be general*, but such as would make it unlikely that the defendant would be guilty of the particular crime with which he is charged.” Wharton’s Am. Crim. Law, 294.

(b) Roscoe’s Crim. Evid. 97, 98. 2 Russell on Crimes, 784. 1 Greenl. Evid. § 54. Wharton’s Am. Crim. Law, 294, 382. *Douglass v. Tousey*, 2 Wendell, 352.

as binding rules of life. But they depend also, in a considerable degree, (like much of what is termed *character*, in the broader sense,) upon physical and moral *temperament*. They are, in other words, *dispositions* (*a*) or tendencies by which the mind is inclined or swayed, with more or less of permanence, in certain directions, in preference to others.

But character, thus reduced and narrowed to the limits and dimensions of *single* moral qualities, is found to undergo another modification, and a still more important one, in passing through the medium of judicial evidence, or in becoming evidence to a jury. It is the particular moral quality, not necessarily as it absolutely exists, but as *it appears*, or has appeared to exist. It is the exterior of life, which the party habitually wears, or has worn, in his intercourse with others; as it becomes, or has become, a subject of observation, inference and ultimate *opinion*, on their part. It is the grade or point at which he stands, *in their estimation*, in that particular respect. It is, in short, his reputation (*b*) among them, of possessing the quality in question. "Character for honesty," "character for chastity," are expressions constantly employed in the examination of witnesses on criminal trials; signifying the reputation of possessing, in a greater or less degree, the particular quality indicated.

With this explanation of the meaning of the term, we proceed to consider the principle involved in the application and use of evidence derived from this source, or in what its efficacy distinctly consists.

Supposing a "character" made out, on the part of the

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(*a*) "Character" is used by Mr. *Bentham*, in the sense of "disposition," or rather, of "reputation for disposition." See his observations, 8 Jud. Evid. 190—192.

(*b*) Character and reputation are the same. *Duncan*, J. in *Kimmel v. Kimmel*, 8 Serg. & Rawle, 887. Character is a term convertible with common report. *Gibson*, J. *Id. ib.* "General character is the estimation in which a person is held in the community where he has resided." *Marcy*, J. in *Douglass v. Tousey*, 2 Wendell, 352, 354.

accused, in the most satisfactory form,—that is, by the testimony of a competent number of witnesses, themselves of known and unimpeachable characters,—the general fact, thus established, is made use of as a ground for the inference of another general fact; namely, the *improbability* that an individual, bearing such a character, (say, for honesty,) could have become guilty of the particular crime charged, (say theft.) The reasoning is *presumptive* throughout, and may be considered as consisting of the following successive inferences. First, the outward deportment which has been observed to exhibit itself with so little variation as to have given rise to a *reputation*, could not have been merely fortuitous or occasional, in its occurrence or exhibition, but must be referred to the operation of some permanent, internal, determining *cause*; be that cause a moral principle, or a natural disposition or habit, having the force of a principle. Secondly, a moving and controlling power, like this, once established in the mind or moral nature, and the existence and action of which are proved by the fruits of outward conduct, *continues to exist*, and to *operate*, and, of course, to exhibit itself in similar fruits of conduct. In other words, the man who has acted honestly, in ninety-nine cases, so far as the observation and opinion of those acquainted with him are concerned, *will not*, in the hundredth case, abandon the course he has so long pursued, and become dishonest; or, supposing the hundredth case to be the one under investigation, *did not* in fact, abandon such course for its opposite. (a) The presumption, in this form, is nothing more than the simple one of *continuance*, already described as one of the most general presumptions in existence. (b) It is a presumption both of fact and law, that persons as

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(a) “It is general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation, down to a certain period, would not then begin to act a dishonest, unworthy part.” 1 Phill. Evid. 469, 470.

(b) See *ante*, p. 21.

well as things continue in the state in which they have once been shown to exist, until the contrary is established by evidence. (a) And this presumption, again, in its application to the present subject, is strongly aided by another presumption, or rather, rule of presumption,—that criminal conduct of any kind is not to be presumed. (b)

It is in this way, and by such a course of reasoning, that evidence of character is made use of to aid in showing the absence of a criminal motive, or to prove the inadequacy of a particular criminal motive assigned; as has been already illustrated under the head of “motives to crime.”

But, like the conclusions arrived at by courses of presumptive reasoning in general, the inferences deducible from evidence of character are by no means infallible, but, on the contrary, liable to more or less of error. The great practical difficulty, subject to be encountered in the application of this species of evidence, consists in the fundamental fact that the reputation for the possession of the particular quality in question, is necessarily drawn from the *exterior* conduct alone. And it is by no means uniformly true that this exterior is the product and result of the internal causes assigned, upon the existence of which its value obviously entirely depends. It is not less true of psychological than of physical facts, that *appearances are often fallacious*. Cases have occurred and continue to occur in this country as well as abroad, in which crimes of the highest grade have, beyond the possibility of doubt, been proved against individuals, who, down to the very moment of their discovery, have borne, even among those best acquainted with them, not only good but irreproachable characters. Men, whose reputation for uprightness in dealing has been almost proverbial, have suddenly appeared as

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(a) Best on Pres. chap. 6, § 186. 2 Evans' Pothier on Obl. 284. 1 Stark. Evid. 36.

(b) Best on Pres. §§ 58—60.

forgers on the most extensive scale. (*a*) Men, with characters for mildness and gentleness, and even the habitual observance of religious duties, have appeared as the perpetrators of atrocious murders. (*b*) These instances of the apparently sudden ruin of the whole moral character, which have sometimes astounded entire communities, and are otherwise so inexplicable, become easy of explanation on the assumption that what *appeared* to be the character, and was so "reputed," was in fact a mere exterior, without any real internal foundation. The ruin has not been sudden, but the reverse. The real character, where it has ever been good, has, for some time, been secretly corrupted, and would have discovered itself sooner, had the proper occasion sooner occurred.

The presumption, then, which is raised by evidence of character, and which is resolvable into the belief that a man who has habitually borne a good character, has acted, or continued to act, in conformity with it, is a *presumption*, in the true *conditional* sense of that species of conclusion; that is, it stands good *until* the contrary is proved, (*donec probetur in contrarium.*) Where the facts of the particular case furnish this *proof to the contrary*, the presumption is, of course, destroyed. And so, where the process is reversed, and the proof of criminal conduct is made in the first instance, without reference to character, (which is the actual

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(*a*) In the case of *Fauntleroy*, who was executed in England, for forgery, in 1824, no less than sixteen witnesses, who had known the accused for periods ranging from ten to twenty-seven years, bore testimony to his possessing "the highest character for integrity;" "as high a character as man could possess;" "a most excellent character," &c. *Rex v. Fauntleroy*, Celebrated Trials, 19, 29. (Phil. 1835.)

(*b*) In the case of Captain *Goodere*, who was convicted of deliberate parricide, in England, in 1741, the prisoner brought forward several witnesses to testify to his good character, one of whom said that the prisoner constantly attended his church twice a day, Sundays, and would be there, at prayers, almost every day. *Rex v. Goodere* and others, 17 State Trials, 1003, 1062. See, also, the cases mentioned, *ante*, pp. 326, 327.

course of proceeding in judicial investigations;) if such proof be satisfactory and convincing in itself, the presumption deducible from evidence of character cannot avail to overthrow it.

Hence the rule, as practically laid down by the courts, that character evidence is of no force or value except in doubtful cases. If the case hangs in even balance, character should make it preponderate in favor of the accused. But if the evidence of guilt be complete and convincing, testimony of previous good character cannot and ought not to avail. (a) This rule, however, is not to be construed to exclude the admission and due consideration of evidence of character, even in clear cases. (b)

(a) Lord Ellenborough, in *Rex v. Davison*, 81 State Trials, 217; and in *Rex v. Waigh*, *Id.* 1122. Story, J. in *United States v. Freeman*, 4 Mason, 510. Parsons, C. J. in *Commonwealth v. Hardy*, 2 Mass. 317. Shaw, C. J. in *Commonwealth v. Webster*, Bemis' Report, 495. Savage, C. J. in *The People v. Vane*, 12 Wendell, 78, 82. Freeland's case, 1 City Hall Recorder, 82, 83. *The People v. Kirby*, 1 Wheeler's Crim. Cases, 64. *The State v. Wells*, 1 Coxe, 424. *The State v. Ford*, 3 Strobhart, 517. 2 Stark. Evid. 365. Wills, Cir. Evid. 131. 3 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) Note 318, pp. 623, 624.

(b) See the remarks of Sir William Russell, in 2 Russell on Crimes, 785, and of Mr. Serjeant Talfourd, as quoted in Wharton's Am. Crim. Law, 296, 297, (ed. 1855,) citing Dicken. Quar. Sess. 6th ed. 563. The learned serjeant dissents considerably from the views and language of the courts, as given in the text; pronouncing the division of cases into *clear* and *doubtful*, independently of evidence of character, to be "a sophism;" and maintaining that the force of character, as an ingredient in the evidence, may be to "render that doubtful, which would otherwise be clear." He admits, indeed, that "there may certainly be cases so made out, that no character can make them doubtful;" but adds, that "there may be others, in which evidence given against a person, without character, would amount to conviction, in which a high character would produce a reasonable doubt; nay, in which character will actually outweigh evidence which might otherwise appear conclusive." But this counter-vailing efficacy of evidence of character against strong and otherwise convincing evidence of guilt, seems to be confined, for the most part, to cases of *larceny*, (*State v. Ford*, 3 Strobhart, 517; Shaw, C. J. in *Commonwealth v. Webster*, Bemis' Report, 495, 496,) which are peculiar in their kind, and in which the accused often possesses no other means of defence than such as evi-



What has been previously said of *alibi* evidence is, to a considerable extent, true of evidence of character. Thus, where character is relied on, as an exclusive defence, or in the hope and expectation of its countervailing and neutralizing the effect of a strong body of criminative evidence, it is reasonable to require that it should be made out in the

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dence of character affords. Thus, the presumption of guilt, arising from the mere fact of the possession of stolen goods, is often allowed to be borne down by proof of character alone. See the reporter's note to *Cockin's* case, 2 Lewin's C. Cas. 235, 237. And see 3 Phill. Evid. (Cowen & Hill's notes,) Note 293, p. 482. But, even in these cases, if the proof of guilt be made quite conclusive, by evidence of acts on the part of the accused, corroborating the physical fact of possession of the goods, evidence of character will rarely avail. The true doctrine on the subject of character evidence, was stated with much discrimination and clearness by Chief Justice *Shaw*, in his charge to the jury in the case of *Commonwealth v. Webster*. "There are cases of circumstantial evidence," observed the learned judge, "where the testimony adduced for and against a prisoner is nearly balanced, in which a good character would be very important to a man's defence. A stranger, for instance, may be placed under circumstances, tending to render him suspected of larceny or other lesser crime. He may show, that, notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character for honesty in the community where he is known; and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience,—it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind,—that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty would satisfy a jury that he would not be likely to yield to such a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like this of murder, to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution." Bemis' Report, 495, 496.

clearest and most satisfactory manner. (a) There should be no doubt in the minds of the witnesses, nor any conflict in their opinions as expressed. And, in order to give the testimony convincing effect, it is equally true, (as in cases of *alibi* evidence,) that the character of the witnesses themselves should be free from objection. (b) In practice, however, much strictness is not always observed on this point, although it would seem to be the more necessary from the fact that it is not the usual practice to cross-examine the witnesses. (c)

Although it is not permitted to introduce evidence of bad character, on the part of the prosecution, in the first instance, even for the purpose of showing a particular disposition or tendency to the commission of the act charged; yet, when the prisoner has once voluntarily offered his character as a distinct subject of examination, and has actually put it in issue, by adducing evidence in relation to it, the prosecutor may then call witnesses to impeach his character, in order to rebut and counteract such evidence. (d)

An accused party may defend himself, not only by proving *his own* good character, which may be done in all criminal cases, but also, in certain cases, by adducing evidence unfavorable to the character of the *complaining* party, or the party alleged to have been the *subject* of the crime and injury charged. Thus, in cases of alleged rape, inquiries

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(a) *Shaw*, C. J. in *Commonwealth v. Webster*, Bemis' Report, 496.

(b) Mr. *Bentham* seems to have considered this to be a point particularly worthy of attention in the admission of this species of evidence. In his opinion, no evidence of character, good or bad, ought to be admitted, without power to the judge, (if he thinks fit,) to allow of time for inquiry into the character of the character-givers themselves; and for the same reason as in case of *alibi* evidence. 8 Jud. Evid. 200.

(c) Roscoe's Crim. Evid. 98. *Alderson*, B. in *Hodgkiss'* case, 7 Carr. & P. 238.

(d) *Commonwealth v. Hardy*, 2 Mass. 817. *Shaw*, C. J. in *Commonwealth v. Webster*, Bemis' Report, 496. Roscoe's Crim. Evid. 98. Wharton's Am. Crim. Law, 294.

into the general character of the complaining party, for want of chastity are always allowable, and evidence of such want of character is frequently adduced and relied on. (a) But in cases of homicide, the rule is that the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*. The accused may prove that he was acting in self-defence, or he may exhibit whatever provocations were given to him, by the deceased, but he cannot set up general reputation as a defence. (b)

III. *Exculpatory facts going to avoid or explain the criminative facts proved.*

The function and tendency of the classes of exculpatory facts or circumstances hitherto considered, are to destroy the effect of the criminative facts proved; or, more properly, to destroy, or virtually to expunge from the case, the facts themselves, by showing their total or partial inconsistency with the criminative facts proved. But the accused may, in certain cases, adopt another course. Where the criminative facts proved cannot, in themselves, be disproved or varied, he is at liberty to prove one or more of a class of facts, the tendency of which is to *explain* the former, or to show them (unfavorable as they appear, on their face,) to be, in point of reality, entirely consistent with the fact of his innocence. The effect of that large and important class of criminative *indicia*, known as "physical facts," may be avoided in this way, the only way, indeed, in which their effect can ordinarily be resisted. The process employed in these cases, is the reverse of that employed in the classes of cases which were previously considered; being a process of *harmonizing* one evidentiary fact with another derived from an opposite view or side of the case, and of harmonizing both with the hypothesis of innocence.

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(a) Roscoe's Crim. Evid. 96, 97.

(b) Wharton's Am. Crim. Law, 295, 296, and the cases cited *ibid*.

Thus, supposing it proved, in a case of murder, that recent stains were found on the dress of the accused, which, on a chemical examination, were ascertained to be stains of *blood*; if the accused can prove that they were occasioned by his having been recently bled; (*a*) or by having bled, slaughtered or cut up an animal; (*b*) or by having accidentally or unconsciously come in contact with some bleeding body; (*c*) the force of the fact will be avoided, and its criminative effect escaped. So, where the dress of a person shows evident marks of portions of the material having been removed by *cutting out*, giving rise to the criminative presumption that they were cut out to remove stains which were otherwise inefaceable; it will be a sufficient exculpation for him to show that the pieces were cut out for an innocent purpose specified. (*d*) So, in those cases of apparently irresistible proof, where the accused has been connected with the crime by the most minute and complete physical coincidences,—such as the exact print of his shoes observed near the body of the murdered person, and his knife obviously employed to commit the crime; or where the fruits of the crime are found on his person;—it is competent for him to escape the effect of the presumptions against him arising from these sources, by proving that the materials of all this evidence have actually been *forged* by another.

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(*a*) *Shaw's case*, Theory of Presumptive Proof, Appendix, case 8.

(*b*) This was attempted to be shown in *Pryor's case*, (Best on Pres. § 228, note (*d*),) but proved not to have been the fact. It was also attempted to be shown in the case of *Johnson and Fare*, (5 Lond. Leg. Observer, 254,) but the proof was not regarded.

(*c*) Case quoted from Chambers' Edinburgh Jour. for March 11, 1887; Best on Pres. § 219, note (*o*).

(*d*) *Rex v Filler*, Warwick Summer Assizes, 1834; Wills, Circ. Evid. 128.

## SECTION XXXI.

*Exculpatory Facts or Circumstances, not necessarily proved, being the Infirmative Considerations applicable to the criminative facts proved.*

The distinctive character of this class of facts has already been considered in the first or introductory part of the present work. (a) They are facts, the mere consideration of which, as probable, or even as possible, in the particular case, tends to render the truth of the principal fact which is proposed to be proved, improbable, in a greater or less degree, by weakening or rendering *infirm* the probative force of the particular evidentiary criminative facts in connection with which they are considered. In other words, they are *favorable interpretations* of the *particular* criminative facts, of which they may, more or less reasonably, admit.

The occasion and propriety of resorting to these "dispro-  
babilizing" facts, (as an acute, though eccentric writer has styled them, (b)) as a ground and means of defence, arise from the consideration which has already been dwelt upon,—that no single criminative fact, of however strong an aspect in itself, as long as it *stands alone*, and unsupported by others, is to be regarded as conclusive evidence of the guilt of an accused party, especially in a capital case. And the reason of this is, that such single unsupported fact may in many instances, be accounted for, on other suppositions than that of guilty agency in the party to whom it apparently points; it is found to admit of a favorable as well as an unfavorable interpretation, and sometimes of more favorable interpretations than one. For instance, the naked fact of finding an article which has been stolen from one person, in

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(a) *Ante*, p. 158.

(b) 3 Benth. Jud. Evid. 13, 14.

the possession of another, (without reference to the *time* of the finding, or the *manner* of the possession, or the *conduct* of the possessor,) constitutes, on its face, a most direct, and apparently, a perfect connection between the crime proved and the individual designated as its perpetrator; the physical fact of possession being the link or medium of connection. But this criminative fact, or *indicium* of guilt, on being examined, is found to admit of several interpretations, all more or less favorable to the accused, and all more or less consistent with the supposition of his innocence. Thus, the article in question may have come into his possession by finding, or by innocent purchase from the real thief, or by the intentional act of the latter, or by mere accident, or otherwise. (a) All these are so many exculpatory facts or considerations, or infirmative suppositions or supposable facts, which, (so long as they exist as probabilities, or do not assume the character of actual improbabilities,) without any proof being made of them, tend to produce in the mind of the judicial investigator, or juror, that state of *reasonable uncertainty*, as to the truth of the principal fact in issue, which should always turn the scale in favor of the accused. (b)

It is the particular condition, then, of the criminative facts proved, especially in point of *number*, which renders this mode of defence,—by supposition, without proof,—admissible. The lowest number possible (being the case before supposed, where only a single fact is proved,) lets in the largest number of infirmative suppositions. With each additional relevant fact proved, these inlets are, one after

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(a) See further, *post*, in this section. p. 561.

(b) The great foundation of these suppositions, and the essential source of their power, is the same with the foundation of the whole principle of presumption, in its largest sense and application; namely, *experience*. The conditions of fact supposed are allowed to be considered, not so much because they are, in the abstract or in the nature of things, possible, as because they all have, at one time or other, been themselves verified as actual facts.

another, closed ; and when the case for the prosecutor has come to consist of a large number of consistent facts, woven by real connections into that peculiar combination called "a chain" of evidence, the infirmative considerations become excluded altogether. They cannot avail against a convincing body of *proved facts*. (a) Nor can they be made use of indirectly, by resolving or breaking up this body into its constituent elements or facts, and applying to each, separately considered, the infirmative suppositions which would be applicable to it and would be competent to weaken or destroy its probative force, if it stood actually alone. This, as already shown, would be assailing the vital principle of all circumstantial proof.

These exculpatory facts or infirmative considerations, of which it is now proposed to treat, may be presented with most clearness and effect, by arranging them under the heads of the several criminative facts, or classes of facts, (already considered,) to which they are respectively applicable.

### I. *Physical facts or circumstances.*

As to the physical facts, appearances and objects supposed to indicate the general fact of the commission of a *crime*, or *corpus delicti*, they may be attributable to occurrences and causes having no criminal character whatever. *Wounds* on the body of a deceased person, and considered to have been the cause of his death, may have been produced by some *casualty*, such as a fall, or the kick of a horse, (b) or the accidental discharge of a fire-arm. *Poison*

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(a) The process of testing the whole body of facts proved, by applying to them one or more opposite or rival *hypotheses*, rests on a different basis, and is not only always allowable, but actually requisite to the attainment of the desired conclusion. See *ante*, pp. 182—192.

(b) *Rex v. Booth*, Warwick Spring Assize, 1808: Wills, Circ. Evid. 172, 173. *Rex v. Downing*, Salop Summer Assizes, 1822; *Id.* 137, 139.

found in the stomach of the deceased, may have been taken by *mistake*. Or, whatever may be the apparent or supposable means of the death, it may have been a case of voluntary *suicide*. And the error may extend further back than this. The subject of the supposed crime may be wholly mis-apprehended. What are taken for the *bones* of a *human* being, may turn out to be the bones of an *animal*. (a) This whole subject will be more particularly considered under the head of proof of a *corpus delicti*.

Physical facts, as employed to *connect an accused* party with a crime proved, or considered as proved, may be resolved into three kinds:—criminative objects or *articles found* in his possession; criminative *appearances* on his *person*, supposed to be derived from the scene or subject of the crime; and criminative *appearances* at the *scene of crime*, supposed to be derived from his person.

The exculpatory considerations applicable to these facts, are brought forward in the shape of *possible causes* or *reasons assigned* for their existence; and these also seem to be divisible into three kinds: accident, innocent conduct of the accused, and conduct of the real criminal or some third person. The following exhibit the principal instances of their application.

1. *Criminative objects or articles found in possession.*

First. The fact of the possession of a *stolen article*, or an article alleged to have been stolen, admits of the following suppositions, as its possible causes.

It may have been conveyed to the place where it was found, by some irresponsible agency, such as the act of a child, or even of an animal. (b)

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(a) *The State v. Boorns*, Supreme Court of Vermont, Bennington County; September Term, 1819. 1 Greenl. Evid. § 214, note.

(b) 3 Benth. Jud. Evid. 49.



It may have been honestly found by its possessor. (a)

It may have been purchased, borrowed, or received as a gift or deposit, from the thief himself, in ignorance of his character: or it may have been purchased, borrowed, or received from a person who purchased or received it from the thief. (b)

It may have been taken from the owner, while in a state of intoxication, with the view of keeping it for him, and returning it on his becoming sober. (c)

It may have been taken from a person suspected of having stolen it, and kept with the view of seeking out the true owner, or bringing the thief to justice. (d)

It may have been deposited with the possessor, without his knowledge or consciousness, by the thief himself, in order to avert suspicion from himself, or from a malicious design to injure the possessor. (e)

It may have been deposited with the possessor, by the owner himself, (it not being a case of theft at all,) from a similar malicious motive. (f)

These suppositions will be further considered under another head. (g)

Secondly. The fact of the possession of a *criminative article*, such as the instrument with which a crime has been committed, or an article known to have belonged to the subject of the crime, or the subject of the crime itself,—may admit of similar suppositions, that is to say:

It may have been thrown away or dropped by the real criminal, and innocently picked up by the possessor; there

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(a) 2 East's P. C. 668.

(b) 2 Stark. Evid. 840. 2 Hale's P. C. 289.

(c) Best on Pres. § 226.

(d) *Id. ibid.*

(e) *Id.* §§ 222, 223.

(f) *Lamb's case*, Saratoga County, New York; 3 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) Note 293, p. 481.

(g) See "Possession of the fruits of crime," *post.*

being nothing in its mere appearance indicative of its criminal use. (*a*)

It may have been purchased, or borrowed, or received as a gift or deposit, from the real criminal, in ignorance of the character both of the article and the person. (*b*)

It may have been deposited on the premises of the possessor, without his knowledge, by the criminal himself, in order to get rid of it or conceal it. (*c*)

It may have been deposited on such premises, or even attached to the person of the possessor, without his knowledge, by the criminal, from a malicious design to criminate the other. (*d*)

It may have been deposited on the premises of the possessor, by a third person, equally innocent as himself, with the mere view of getting rid of it, and escaping its supposed or known criminative effect. (*e*)

These suppositions, also, will be again adverted to. (*f*)

## 2. *Criminative appearances on the person.*

First. Appearances of *blood* on the person or clothing admit of the following suppositions, in the way of explanation :

It may not be blood at all, but a stain produced by a liquid or substance of similar color. (*g*) But supposing it ascertained to be blood,

It may have been occasioned by an accidental bleeding from the nose, &c. or a wound on the person. (*h*)

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(*a*) Best on Pres. § 218, p. 297

(*b*) *Supra*, p. 540.

(*c*) *Ante*, pp. 439—441.

(*d*) Best on Pres. § 223.

(*e*) 3 Benth. Jud. Evid. 36. Best on Pres. § 222, p. 301.

(*f*) See *post* "Possession of articles of criminative evidence."

(*g*) *Ante*, p. 137.

(*h*) Quinctil. lib. 5, c. 9. Best on Pres. § 225, p. 303.

It may have been occasioned by unconscious contact with another person having a bleeding wound. (*a*)

It may have been occasioned by having come in contact with a bleeding body in the dark. (*b*)

It may have been produced by a surgical operation, as by the party's having been recently bled, or having recently bled himself. (*c*)

It may not be human blood, but that of an *animal*, transferred to the person on the occasion of his having slaughtered it, in the way of his calling, or otherwise; (*d*) or in consequence of his having handled it in any way, or come in contact with it or within reach of blood issuing from it. (*e*)

Secondly. *Marks*, as of cuts, scratches, wounds or bruises on the face or person, may have been produced by a fall, or the kick or scratch of an animal, (*f*) or contact with sharp substances of various kinds. (*g*)

### 3. *Criminative appearances at the scene of the crime.*

First. *Prints* of the shoes of the accused, discovered in

(*a*) In a case where part of the evidence against a man charged with murder, consisted in his night-clothes having been found stained with blood,—a fact which he declared his inability to account for, it was afterwards discovered to have been occasioned by his bed-fellow having a bleeding wound, of which the prisoner was not aware. Chambers' Edinb. Journal, March 11, 1837. Best on Pres. § 219, note (*o*).

(*b*) See the last note. And see *Bradford's* case, Theory of Presumptive Proof, Appendix, case 7, pp. 89, 98.

(*c*) *Shaw's* case; Theory of Presumptive Proof, Appendix, case 8, p. 96.

(*d*) *Pryor's* case; Best on Pres. § 226, note (*d*). *Johnson and Fure's* case, 5 Lond. Leg. Observer, 254.

(*e*) *Richardson's* case, *ante*, p. 246. *Beards'* case, Stafford Summer Assizes, 1844; Wills, Circ. Evid. 101, 108. In this case, the fact was shown.

(*f*) *Rex v. Downing*, Salop Summer Assizes, 1822; Wills, Circ. Evid. 137, 139. In the case of *Ferry*, the murderer of Madam *Mazel*, in 1699. (and for whose crime *Le Brun* innocently suffered,) the criminal accounted for scratches and wounds on his hands, by saying that they were made by a cat which he had attempted to kill. 5 Lond. Legal Observer, 202.

(*g*) In *Richardson's* case, the prisoner accounted for scratches observed on his face, by saying that he had gotten them when pulling nuts in a wood, a few days before. *Ante*, p. 244.

moist earth or in snow, about the spot, or leading to or from it, admit of the following suppositions.

The impressions may not have been made by the accused at all, but by another person wearing his shoes. (*a*)

If actually made by the accused himself, it may have been in the course of going to the spot, to render assistance. If, however, it were a clear case of murder, and no other foot-prints were seen, this supposition would be excluded.

Secondly. *Bloody tracks* of no definite shape, but serving to show the presence of another person besides the deceased, and the direction of his movements, may have been unconsciously caused by an innocent individual, while in the act of endeavoring to render assistance in the case. (*b*)

Thirdly. As to impressions from *other parts* of the person—bloody *finger-marks* may have been produced in the manner last mentioned. Impressions from the *knee* may have been made in the act of kneeling by the body, to see if life was really extinct, or for the purpose of more adequately rendering assistance to the sufferer. (*c*)

## II. *Facts of conduct, or moral circumstances.*

The exculpatory or infirmative considerations to which

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(*a*) Anonymous case, Theory of Pres. Proof, Appendix. case 10.

(*b*) In a French case, cited in Taylor's Medical Jurisprudence, the following facts appeared. A young man was found dead in his bed, with three wounds on the front of his neck. The physician who was first called to see him, had unknowingly stepped in the blood with which the floor was covered, and had then walked into an adjoining room, passing and re-passing several times. He had thus left a number of bloody foot-prints on the floor. No notice of this was taken at the time; but on the following day, when the examination was resumed, the circumstance of the foot-prints was particularly attended to, and excited a suspicion that the young man had been murdered. The suspected person was arrested, and would have undergone a trial on the charge of murder, had not M. *Marc* been called in to examine all the particulars of the case. A similar circumstance occurred in the case of *Eliza Grimwood*, who was murdered at Lambeth, in June, 1838. Taylor's Med. Jurispr. 201, 202. (Phil. ed. 1853.)

(*c*) Best on Pres § 218.

facts of this class may be considered to be subject, are, for the most part, applied to them in the same general way as to facts of the physical class, last mentioned; that is, they are applied in the shape of *possible*, (and more or less probable) *reasons* assignable for their existence, or supposed existence, in the particular case under investigation.

### 1. *Motives to Crime.*

The exculpatory considerations, or rather, circumstances, applicable to motives to crime, more commonly take the shape of facts *proved* or contended to be proved, authorizing favorable inferences, than of *suppositions* explaining proved facts. Hence they, for the most part, belong to the class of circumstances, already considered, in which the accused either relies upon the evidence adduced by himself, or upon the absence or insufficiency of the prosecutor's evidence, to establish the total absence of a motive, or to show the inadequacy of the particular motive assigned. It will not be necessary, therefore, to dwell longer on this head. (a)

### 2. *Verbal intimations of intended criminal action.*

The principal infirmative supposition applicable to circumstances of this class, is the common one which is more or less reasonably applicable to every statement or observation made by an accused party, and alleged to have been heard by another; namely, the possibility that the statement or observation may have been *mis-understood* by the witness, or incorrectly *remembered*, or *mis-reported* by him. (b)

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(a) Motives being considered by Mr. *Bentham* as not being, properly, criminative circumstances, "no counter-probabilities," in his opinion, seem applicable to them, "in the character of infirmative considerations." 3 Jud. Evid. 188. The whole subject of motives, including such views as are most commonly presented in behalf of accused parties, has already been treated at some length, under a former head. See *ante*, Section IV. pp. 281—328.

(b) See *infra*, "Declarations of intention."

In regard to *predictions* of approaching mischief to an individual who is afterwards found murdered, it may have been the fact that the accused was *really* speaking the conviction of his own mind, and without any *criminal* intention. And it has been well remarked that idle prophecies of death are quite as frequently the offspring of superstition, as of premeditated assassination. (a)

### 3. *Expressions of ill-will.*

These, also, may have been mis-understood, mis-remembered, or mis-reported by the witness. (b)

But supposing them to have been actually uttered as proved, they may have been uttered on some sudden *provocation*, or in the extremity of momentary *passion*, or during a state of *intoxication*, (c) without any real, settled and abiding feeling of malice against the subject of them.

### 4. *Declarations of intention.*

In addition to the infirmative suppositions of mis-understanding, inaccurate recollection, (d) and mis-report, the following may be mentioned.

It does not necessarily follow, because a man has avowed an intention to commit a crime, that such intention *really*

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(a) Best on Pres. § 285.

(b) See the heads immediately preceding and following this. In the Scotch case of *James Stewart*, A. D. 1752, in which expressions of this character were much relied upon, they were met by the following remarks from one of the counsel for the pannel [prisoner.] “It must occur to every man, how extremely dangerous a proof of this kind is: there are very few witnesses who can repeat exactly the particulars of any conversation, and still fewer who can recollect these particulars at any distance of time. In such cases, much may depend upon the tone of voice, or gesture of the person who speaks; and the variation of a circumstance may alter the meaning of the whole expression.” 19 State Trials, 1, 224.

(c) This was claimed to have been the fact in *Stewart's* case, referred to in the last note. 19 State Trials, 226.

(d) Best on Pres. § 287.

*existed* in his mind. The words may have been spoken in mere *bravado*, or with the view of *alarming* or annoying the object of them; (a) or, like expressions of ill-will, may have been uttered in a moment of *passion*, or state of intoxication, without any settled evil purpose.

The criminal intention, if actually and seriously entertained, may have been *changed* or *abandoned*. (b)

The intention may have been not only really criminal, but unchanged and persisted in, and yet the power to carry it into effect may have *failed*; the party having been anticipated in his purpose by the act of another. (c)

#### 5. *Threats.*

The infirmative suppositions applicable to these circumstances, are the same with those just enumerated; with the addition of the following.

Threats being considered to be either uttered in the presence and hearing of the person threatened, or intended to come to his knowledge, the sole intention may have been to *alarm* and intimidate him. (d)

If the accused really intended the mischief avowed and threatened, it is not *reasonable* that he would *make it known* to the object, and thereby naturally put him on his guard against the intended act. (e)

#### 6. *Preparations for crime.*

The infirmative suppositions applicable to circumstances of this class, comprise the following.

The appearances supposed to be indicative of preparation, and which are construed as such, may have been *mis-appre-*

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(a) Best on Pres. § 287.

(b) 8 Benth. Jud. Evid. 74. Best on Pres. § 236

(c) *Id. ibid.* 8 Benth. Jud. Evid. 74, 75.

(d) *Id.* 77, 78.

(e) *Id. ibid.*

*hended*, in consequence of hasty or imperfect observation, and may, in fact, possess no criminal quality whatever.

The appearances indicative of preparation may have been correctly observed, and may have been as reported by the witness, (including, to a certain extent, the unfavorable construction put upon them,) and yet may have no real connection with the accused, having emanated from no conduct on his part, but having been wholly *fabricated* by the real criminal or some other person; as by conveying into the possession of the accused, (so as to become a subject of observation,) a poison of the same description as that afterwards used in committing the crime, or perhaps the identical instrument used in committing it. Thus, the connection between the material object or substance observed, and the crime committed, may be real and actual, while that between the same object or substance and the party sought to be inculcated by it, is false and forged.

Again, the appearances supposed to be indicative of preparation may be clearly traceable to the action of the accused, and closely connected with it; consisting of facts of conduct, in addition to, or in union with physical facts or material objects, and yet be devoid of any real criminal quality whatever. Thus, it may be true not only that the accused had the poison in his possession before the crime, but that he had it knowingly, having actually procured it with his own hands. And yet, even in this case, the important psychological fact of *intention* may be wholly wanting. In most instances, in order to give an act the character of a *preparation* for another act, it is requisite that it should not only precede it, in the order of time, and be adapted to it, in point of quality, but that it should have that positive connection with it, in fact, which the mental act of intention alone can supply. The intention, in the case of poison just supposed, may have been wholly *innocent*, the poison having been really procured for the purpose of destroying noxious



animals. (a) Where, however, the acts of preparation, or the articles or instruments prepared, are such as to indicate their intended objects and uses, on their face, and do not reasonably admit of any other than a criminal application, (as in the case of burglars' tools, counterfeiting implements, secret explosive machines and incendiary contrivances,) this favorable construction of the intent will, of course, be excluded.

Again, supposing that, in addition to the connection between the physical fact or object, and the fact of conduct, as above, a further connection is established between both and the crime committed, so far as that there was an actual intention, on the part of the accused, to operate against the subject of the crime, and to operate injuriously and criminally; the intention, though noxious and criminal, to a certain extent, may have been *less so* than the result actually proved to be. (b) Thus, the poison may have been procured, in ignorance of its really and uniformly fatal efficacy, and may have been administered merely for the purpose of sickening the individual by whom it was taken, and not with any view of destroying life. (c) But this supposition is, on the other hand, liable to be excluded by that well known rule which charges every sane person with knowledge of the natural or probable consequences of his own voluntary acts.

Finally, supposing that in addition to all the criminative connections established as above mentioned, there was, in point of fact, a real and full intention to commit the crime which followed; the circumstances indicative of the supposed preparation, are subject to the same infirmative considerations as declarations of intention themselves; namely,

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(a) Best on Pres. § 235.

(b) 8 Benth. Jud. Evid. 72.

(c) This was the motive alleged in the Scotch case of *Rex v. Alcorn*, 1 Syme's Justiciary Rep. 221. Wills, Circ. Evid. 180.

The intention may have been *changed* or abandoned ; (a) and,

The intention, if unchanged and persisted in, may have been *anticipated* by the act of another. (b)

7. *Opportunities and facilities for the commission of crime.*

The principal infirmative supposition applicable to the circumstance of opportunity to commit a crime, is analogous to that general one which has been applied to most of the criminative circumstances already considered, and is of an equally obvious character ; namely, that, admitting it proved to have existed, it does not necessarily follow that it was actually taken advantage of by the party shown to have possessed it ; or that it was not taken advantage of by another person. In order to give it this effect, where it is solely or chiefly relied on, the circumstances tending to show its existence must be *exclusive* in their operation, by demonstrating that no other person had, or could have had the opportunity possessed by the accused, and that, therefore, by a necessary consequence, none but he could have committed the crime. (c)

The fact that opportunities of the most ample kind, for the commission of great crimes, arising out of facilities of access to persons and property, are frequently, and even constantly and habitually enjoyed by individuals the most unlikely, from their characters and relations, to take advantage of them, and who never do take advantage of them, (d) is sufficient to show the inconclusiveness of any presumption deducible from this circumstance alone. Indeed, unless the exclusive character of the opportunity shown be satisfactorily established, as just mentioned, or unless it be ade-

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(a) 8 Benth. Jud. Evid. 74.

(b) *Id. ibid.* Best on Pres. § 236.

(c) See *ante*, pp. 369, 370.

(d) See *ante*, p. 305.

quately confirmed by other independent facts, its mere existence, though always essential, as a ground of inculpation, is far less criminative in its bearing, than many of the criminative circumstances previously treated of. Its whole tendency is merely to show a *possibility* that the act might have been committed by the person supposed to be indicated; without any of that quality of positive *probability* in which the essence of the force of presumptive evidence resides. For example, it is much more likely that a person who has gone the length of forming a criminal *intention*, and manifesting that intention by words and acts,—and who has thus given to his own voluntary conduct the most positively criminal quality, and in the most intimate union, of which, up to that point, it admits,—persists in such intention, and ultimately carries it into effect; than that a mere external (and sometimes fortuitous) relation, itself of no moral character, like this of *opportunity*, should, by the mere force of coincidence, and consequent supposed connection with the person, at once lead to the same criminal result.

#### 8. *Attempts to commit crime.*

The circumstances belonging to this head are, by most writers on presumptive evidence, classed with *preparations*, and thereby made subject to the same infirmative considerations. (a) It is to be observed, however, that, as they are much farther advanced towards the commission of the crime, stopping short only of the actual accomplishment of that object, their criminative aspect and tendency are ordinarily much stronger than those of mere preparations; and they are, accordingly, for the most part, much less easily avoided in the defensive way of favorable construction or supposition. The following infirmative suppositions may be mentioned.

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(a) 3 Benth. Jud. Evid. 71, 72. Best on Pres. §§ 233, 234—236.

The act which has been construed into an attempt may not, in point of fact, have been such ; that is, it may not have been directed against the person or property apparently indicated ; the observer having quite *mis-apprehended* it ; just as he may have misunderstood a verbal expression of a supposed criminative bearing.

If correctly observed, the act may have taken its supposed criminative complexion from *accident*, and so have been devoid of the essential criminal quality flowing from intent.

If intentional, and actually directed against the person or property indicated, its object may have been *less noxious* or criminal than the result, as shown in the crime committed.

If the attempt were actually made, and with a full intention to perpetrate the crime which followed, such intention may have been *abandoned*, and no further attempt afterwards made ; the crime being, in fact, committed by another. (a)

#### 9. *Proximity, and other Concomitant Circumstances.*

Among the infirmative considerations applicable to this class of circumstances, the following are most prominent.

The supposed crime may actually be *no crime* at all, as in the case of accidental death, or it may be a case of suicide ; thus at once depriving the circumstances, however forcible they may be in other respects, of all really criminative quality against the accused, or any other person, whose presence or proximity they serve to indicate. (b)

Supposing it a clear case of crime, the circumstances indicative of proximity or presence may not possess that quality of *exclusiveness* which is always requisite to fasten the crime effectually upon the accused. (c) *Another person*

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(a) See 3 Benth. Jud. Evid. 71, 72—74.

(b) See Lord Coke's example of a violent presumption, as explained by infirmative suppositions, *ante*, p. 184. And as to proof of a *corpus delicti*, see *post*. p. 677.

(c) See *ante*, p. 370.

may have been present. The real murderer may have left the dead body, and escaped from the room or the house in which it is found, only the moment before the accused entered it. (a) The real incendiary may have fled from the building fired, only the moment before the accused approached it. The presence of the accused himself, on such an occasion, may be accounted for upon grounds of humane and laudable intention to render assistance, or mere innocent curiosity, or even mere accident.

The *exclusive* character of the accompanying circumstances, in regard to means and modes of entrance upon and exit from the scene of the crime, however apparently satisfactory, *may not be real*. The murderer may have escaped from the room or house, by a door, or even a window, the existence or capacity of which has been entirely overlooked. (b)

Supposing the exclusive presence of one particular person to be satisfactorily established, such person may not have been the accused, but *another person* more or less closely resembling him. Entire mistakes in point of personal identity have been made under circumstances most favorable to accuracy of vision, as in broad day-light. (c) In seasons of darkness or obscurity, which are usually the chosen seasons of crime, this liability to mistake is naturally increased.

The proximity observed, and from which a criminative presence of the accused is inferred, may have been produced by the action of the real criminal, or even of a third person

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(a) See *Bradford's case*, Theory of Presumptive Proof, Appendix, case 7.

(b) See the case mentioned by Mr. *Sturkie*, and referred to, *ante*, p. 184, 185. And see the case mentioned *ante*, p. 371, note (a).

(c) See the case of *Rex v. Wood and Brown*, (28 State Trials, 819,) in which Sir *Thomas Davenant*, an eminent barrister, swore positively to the persons of two men, whom he charged with robbing him in the open day-light. They, however, proved an *alibi*, and were subsequently shown to have been wholly innocent of the crime. *Wills, Circ. Evid.* 31. As to the subject of identification, see further, *post.* p. 631.

equally innocent with the accused, in the way of *fabricating* evidence. As where the body of a murdered man is actually conveyed by the murderer, or by another, into the premises of a person wholly innocent and ignorant of the crime. (a)

In a case of supposed murder the circumstance that the accused was the *last person seen* in company with the deceased, previous to his death or disappearance; or, in other words, that the deceased when last seen alive was seen in his company, does not, of itself, necessarily exclude the possibility that *another* and *unseen* person may have joined the deceased, after the accused left him, perpetrated the crime, and effectually escaped.

The circumstances showing the presence of the accused at *two different* points of space and periods of time,—the crime having been perpetrated in the vicinity and during the interval,—may also prove that he *could not*, by any reasonable possibility, *have had time* to commit the crime during the interval. (b)

The circumstances of the accused leaving his residence *just before*, and returning to it *just after* the perpetration of a crime in the vicinity, merely show a coincidence of action, without any necessary criminative effect.

*Hastiness* of movement *towards* the scene of the supposed crime may have been prompted by a desire to render assistance, on hearing alarming sounds or cries from the spot. And hastiness of movement *from* the spot may have been dictated by a similar desire to call for more adequate aid, (c) or by a fear of impending danger to the party himself.

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(a) See *Cunningham's case*, (*ante*, p. 426, note,) in which there were three successive transfers of the dead body.

(b) See *Thornton's case*, as explained by Mr. *Wills*, *Circ Evid.* 141—144.

(c) See the first infirmative supposition, applied to Lord *Coke's* example of a violent presumption, *ante*, p. 184.

*Secrecy* of movement (*a*) near the scene of the crime, even including the disguise of the person, may be explained on other suppositions than that of guilty intent. The lovers of servants are apt to be stealthy in their visits, and in this way are sometimes taken for thieves. (*b*) And secrecy and disguise have sometimes been assumed and practised out of mere sport. (*c*)

10. *Destruction, suppression and eloignement of evidence.*

The following infirmative suppositions may be mentioned under this head.

Acts of this character proved against the accused may have been dictated by a pardonable anxiety, on his part, (however weak or injudicious,) to escape the supposed and dreaded criminative effect of circumstances with which he has been accidentally, or involuntarily and unavoidably, but innocently connected. An individual who has become stained with the *blood* of another, slain, in his immediate presence, by accident or by his own hand, naturally seeks to *remove* it from his person or clothing; and, in so doing, may be actuated, more or less, by a fear of possible prejudicial consequences to himself. A person who buys an article with the name of a former owner left upon it, usually seeks to remove or *erase* such evidence of ownership. In a case of this kind, the article may have originally been *stolen*, but purchased in entire ignorance of that fact.

Supposing a murder or suicide committed with the weapon of another, which, shortly after, returns to the possession of the innocent owner; the latter, if aware of the circumstances, might be tempted to destroy or conceal it, or, at least, to remove the evidences of its use, from a desire to

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(*a*) Called, in Mr. *Bentham's* phraseology, *clandestinity*, of which he makes various divisions. 3 Jud. Evid. 160—162.

(*b*) *Id.* 162, note. Best on Pres. § 252.

(*c*) *Id. ibid.* 3 Benth. Jud. Evid. 168.

prevent the formation of injurious, or, at least, annoying though unjust and unfounded suspicions against himself.

The criminative article or appearance sought to be destroyed, suppressed or eloigned, may have been, in the first instance, *fabricated* by the real criminal, by placing it in the possession of the innocent party, or even annexing it to his person; and the removal of it may be prompted by the desire of avoiding the effect apprehended to follow from the possession of such an article or appearance: the latter circumstance being known to constitute one of the most forcible elements of criminative evidence. (a) "In the view of removing the imputation from himself," observes Mr. *Bentham*, "a murderer has been known secretly to deposit in the apparent possession of an innocent person, the blood-stained instrument or garment, or some other such article, so circumstanced as to operate in the character of a source of criminative real evidence." (b) If, in such a case, the party practiced upon should become aware of the manner in which such fabrication had been produced, there would be a natural, and, perhaps, not censurable inclination, on his part, leading to a determination to *re-transfer* the articles to the place from which they came. And he would, as naturally, select for such a process, a season which would enable him to effect it unobserved; as by attempting it during the night. Now, if he should happen to be observed in the act of re-transfer, as the author just quoted has remarked, it might be to him, instead of the murderer, that the artifice of fabrication would come to be imputed. (c) This consideration, however, more properly belongs to a subsequent head.

This process of innocent removal or transfer might be extended to the body of a dead person found on the premises

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(a) See *ante*, p. 436.

(b) 8 Jud. Evid. 164.

(c) *Id. ibid.*



of another; and actual instances of this kind are recorded to have occurred. (a) But the absolute concealment (as by burial) or destruction of a body under such circumstances, might be more difficult to reconcile with the supposition of entire innocence, though it has been conceded as a strictly possible fact, even in cases where the mode of destruction was of the most repulsive character. (b)

The circumstances of secret movement or seclusion of the party, while engaged in these acts of suppression or removal, are only auxiliary and incidental; and their effect is necessarily avoided with the avoidance of the effect of the acts themselves. Even the eloignement of a person who may have witnessed an innocent act of this description, might be resorted to, as a means of more perfect security.

As to the hurried and even stealthy *burial* of a dead body, although confessedly a circumstance of suspicion, it is, in itself, by no means conclusive evidence of guilt. Such conduct, especially in case of the interment of a child, may have been dictated by ignorance, or the desire to escape the exposure of an illegitimate birth. And persons living in a state of extreme poverty might be induced to inter a deceased child with their own hands, and of course with the utmost privacy, in order to avoid the expense apprehended to attend a burial in the ordinary form.

The suppression of the evidence of a fact may sometimes be resorted to, by an innocent person, from other motives than that of self-protection; such as regard to the *good name* of himself, or his family, or a determination not to reveal a secret which might expose him to contempt. Thus,

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(a) See *Cunningham's case*, *ante*, p. 426, note. Mr. *Bentham* quotes the story of the Little Hunchback, from the *Arabian Nights' Entertainments*. 3 *Jud. Evid.* 36, 164, note.

(b) Lord Chief Justice *Tindal*, in *Rex v. Greenacre*, Central Crim. Court, April, 1837. In this case, his Lordship told the jury, that what they had to consider was the mere general fact of concealment, without reference to the particular circumstances under which it took place.

in an English case, where a person had been indicted for a crime which he had not committed, the evidence against him having been fabricated by the real criminal ; it appeared that the prisoner suppressed his name, and went to trial under a feigned name, out of regard to his family. (*a*)

11. *Fabrication or forgery of evidence.*

The following infirmative considerations may be mentioned as applicable to circumstances of this class.

A party may be discovered to have actually fabricated one or more physical facts, in order to remove unfavorable appearances from his own person or premises, or in order to create positive appearances in his favor ; and yet be really innocent of any criminal connection with the case of which such facts are claimed to form a part. An innocent person, finding a criminative article,—such as a blood-stained garment or a bloody knife,—upon his premises, and naturally (however injudiciously,) desiring to rid himself of it, may carry his action farther than mere eloignement or removal, by conveying the article upon the premises of *a neighbor* ; thus actually fabricating evidence against the latter. (*b*)

This species of conduct may also have been resorted to in the way of self-protective *retaliation* ; as where a person

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(*a*) *Rex v. Gill*, Sessions Papers and A. R. 1827; Wills, Circ. Evid. 54, 55. In this case, the prisoner was convicted and sentenced to transportation for life, but was afterwards shown to have been wholly innocent and received a pardon.

(*b*) It has been considered possible that there might be a *series* of such transfers from one neighbor to another,—all prompted by the same urgent desire to get rid of a supposed dangerous article, in the most effectual manner; and none of the parties being, in any degree or sense, guilty of, or privy to the crime which the physical facts themselves may indicate. No actual case has been vouched in support of this supposition; but Mr. *Bentham* has referred to the story of the Little Hunchback, in a well known work of fiction, and Mr. *Best* has approved the reference as a pertinent one. 3 Benth. Jud. Evid. 86, 164. Best on Pres. § 222. The story itself went to show how the body of a man, who had died by accident in the house of a neighbor, was conveyed by him, under the apprehension of suspicion of murder, in the event

finding a criminative article upon his premises, and knowing or suspecting the source from which it came, and the motive which induced its transfer, determines to re-transfer it, as has already been mentioned. (a) In point of reality, this would be no fabrication at all, but simply the *correction* of a previous fabrication, or a *restoration* of the facts to their original connections and true appearances. And yet, if the individual should happen to be observed in the act of re-transfer, his conduct would, in that particular, wear all the exterior of positive fabrication, and would, most probably be classed under that head. (b)

But it is possible that a strictly innocent person, under the influence of certain inducements, may go farther than even the acts just mentioned. He may not only be tempted to fabricate the *elements* or materials of evidence, by producing appearances which may be observed by others, who may, in the character of judicial witnesses, report them to the tribunal, but, if pressed by the peculiarities of his position, and seemingly reduced to extremity, he may actually go the length of *presenting* them, *himself*, in the form of *judicial* evidence, by way of defence against a criminal charge. A prominent instance of this species of fabrication occurred in

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of the corpse being found in his house, into the house of another neighbor, who finding it there, and acting under the influence of a similar apprehension, in like manner transmitted it to a third, who, in his turn, shifted the possession of the corpse to a fourth, with whom it was found by the officers of justice. *Id. ibid.*

(a) *Supra*, p. 555. This was actually done in the case of *Sawney Cunningham*, *ante*, p. 426, note.

(b) 3 Benth. Jud. Evid. 164. The possibility of the adoption of a similar species of retaliatory or *defensive* forgery is admitted to exist even in civil cases. "Is there any thing impossible," inquires Mr. *Best*, "in the suggestion, is it even unlikely, that, in many cases, the fabrication of evidence has been resorted to under the apprehension, perhaps the certain knowledge, that similar malpractices will be made use of by the other side? Suppose a man is sued on a bond which he knows to be a forgery, but he feels that it is altogether out of his power to prove it so. *Forge a release*, or *bribe a witness to prove payment*, is a suggestion too obvious not to have been occasionally acted on." *Best on Pres.* § 148, p. 208; citing 3 Benth. Jud. Evid. 168.

the well known case of the uncle and niece, recorded by Lord *Coke*, (a) and mentioned on a former page. (b) The niece, a girl about eight or nine years old, who had been brought up by her uncle, suddenly disappeared one day, under circumstances which were considered so suspicious as to justify the uncle's arrest. Having been committed to jail, on suspicion of murder, he "was admonished by the justices of assize," says *Coke*, "to find out the child, and thereupon bailed until the next assizes." Being unable to do this, and "fearing what would fall out against him," and probably having reason to apprehend the worst consequences, the accused, in his extremity, resorted to the hazardous and ill-judged expedient of taking *another child*, as closely resembling his niece, both in person and years, as he could find, and *dress[ing] her up* to represent her; and this false child he brought to the next assizes and presented as his niece. But upon view and examination the fraud was detected; and having by this act only strengthened the presumptions which previously existed against him, the uncle "was indicted, found guilty, had judgment and was hanged." He was, however, in point of fact, entirely innocent of the crime for which he suffered; for the niece was not dead, but had only run away from him, (on occasion of being corrected for some fault,) into an adjoining county, as was proved by her appearing about seven or eight years after, and demanding the lands which her uncle had held as her guardian. Cases of this description serve to sustain the observation of a learned writer, that, "even where the positive fabrication of evidence is proved against a party, tribunals, whose object is the ascertaining of truth, will consider the nature of the case, and the temptation which might have led to fabrication." (c)

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(a) 3 Inst. c. 104, p. 232.

(b) *Ante*, p. 211, note (b).

(c) Best on Pres. § 148, p. 208.

### 12. *Possession of articles of criminative evidence.*

The principal infirmative considerations applicable to circumstances of this description have already been summarily mentioned under a previous head. The following may be added.

The case may not be one of crime at all. And, in addition to the very possible and familiar mode of acquiring temporary possession of an article belonging to another, by way of *loan*, it is possible that a small article, such as a coin, may be accidentally transferred from one person to another, without the knowledge of either, in consequence of closely adhering, unobserved, to another transferred article. (a) In a case reported to have actually occurred, in which a coin, identified as having belonged to a person who had suddenly disappeared, under very suspicious circumstances, was found in the pocket of the suspected party, who was wholly unable to explain how he came by it; it was shown that it might have been transferred by having become fastened between the blades of a pocket-knife (the two articles being carried in the same pocket,) which had been given by the supposed deceased to the accused, in the dark, for a temporary purpose. (b)

Where the supposed criminative article found in the possession of the accused is a writing, such as a letter referring to a crime already committed or proposed to be committed, the infirmative supposition that it may have been clandestinely introduced into his possession, without his knowledge, has a peculiarly appropriate application, arising from the unusual facilities for introducing writings into a man's possession, without his consent or privity. The letter found may have come, for example, by the post, addressed to himself; it may have come by the post, addressed to some

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(a) As to the case of transfer by the agency of an animal, see the next head.

(b) 16 London Legal Observer, 266.

inmate of his, and thus remain in his possession for any length of time, without his knowledge. (a) Supposing such a letter to contain some such expression as this: "On such an occasion," (naming it,) "my dear friend, you failed in your enterprise;" an enterprise (describing it by allusion) of theft, robbery, murder, treason: "on such a day, do so and so, and you will succeed." (b) "In this way," observes Mr. *Bentham*, "so far as possession of criminative written evidence amounts to crimination, it is in the power of any one man to make circumstantial evidence of criminality in any shape, against any other." (c) But such an artifice, as Mr. *Best* has remarked in quoting the writer last named, would be most likely to be resorted to in countries where the rules of evidence are not well understood, and convictions of offences, especially of such as are of a political nature, are based on slender proof. (d)

### 13. *Recent possession of the fruits of crime.*

The infirmative considerations applicable to this circumstance have already been summarily stated under a previous head. (e) They may now be repeated, with some illustrations.

The article found in the possession of the accused, and claimed to have been stolen, may not, in fact, have been stolen by any person, but may have innocently come into the hands of the possessor, in any of the following modes of acquisition: (f)

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(a) 3 Benth. Jud. Evid. 44. But if a letter addressed to himself were found in his possession, opened, it would go to exclude the supposition of want of knowledge.

(b) 3 Benth. Jud. Ev. *ub. sup.*

(c) *Id. ibid.*

(d) Best on Pres. § 223.

(e) *Ante*, p. 539.

(f) In the case of the *State v. Merrick*, (19 Maine, 98,) it was held that even where the stolen goods are found in the possession of the accused, and under his control, within a short time after the larceny is committed, he is not

It may have been honestly *found* by the possessor. Mr. *East* has remarked that this is "the most trite excuse in cases of larceny, and in general, the least founded."<sup>(a)</sup> Its truth is, however, manifestly possible in every case where the article in question admits of being easily lost; the difference being that the honest finder usually gives or expresses a willingness to give particulars of information which may serve to test the truth of his statement; while the thief avoids and suppresses them.

It may have been taken from the owner by the possessor, but from an innocent and, indeed, commendable motive; as where it has been taken from the owner, while in a state of *intoxication*, with a view of keeping it for him, and restoring it on his becoming sober. A case is referred to by Mr. *Best*, where a pedlar got drunk in a public house, and a person present took possession of his pack, with the view of returning it. <sup>(b)</sup>

It may have come into the possession of the party with whom it is found, without any knowledge on his part, through some *irresponsible agency*, such as that of a child or an animal. Mr. *Bentham* mentions a French case, in which an innocent person was accused of stealing from the house of a neighbor, several pieces of gold, and, being convicted, suffered an ignominious death. But it was afterwards discovered that the real thief was a *magpie* (a bird remarkable for a propensity to pick up and hide small articles,) which, without the privity of its master, had taken the money at different times, piece by piece, from the too accessible hoard of a neighbor, and deposited it in a place inaccessible to any other than the unfortunate person who suffered as for stealing it. <sup>(c)</sup>

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bound to show to the reasonable satisfaction of the jury, that he became possessed of them otherwise than by stealing. The evidence may fall far short of that, and yet create in the minds of the jury a reasonable doubt of his guilt.

(a) 2 East's P. C. 668.

(b) Best on Pres. § 226.

(c) 3 Benth. Jud. Evid. 49, 50

It may have come into the hands of the possessor by a mere physical *accident*, as by having *adhered*, unperceived, to another article honestly and intentionally transferred to him. (*a*)

It may have been clandestinely introduced on the premises of the possessor, by the *owner himself*, for the express purpose, and with the malicious design of laying the foundation of a criminal charge against him. A remarkable instance of this kind occurred at Moreau, Saratoga county, in this state, some years ago. A blacksmith secretly deposited a piece of iron in a heap of coal which lay in the coal-house of a neighboring blacksmith, named *Lamb*, and then swore out a search-warrant, on which he found the iron, to *Lamb's* great astonishment; and was proceeding to convict *Lamb* before a special session. He would probably have succeeded, had not a boy of a Mr. *Billings*, who resided within a few rods of the shop, accidentally seen the prosecutor, a few mornings before, passing with something into the shop about daylight, and returning in an unaccountable manner. This led to a suspicion that the whole affair was simulated; resulted in a thorough investigation; and the prosecutor afterwards suffered the penalty of his fraud and perjury. (*b*)

The article found and claimed to have been stolen, may be, in fact, the possessor's *own* property, but so closely resembling the article claimed, as to have led the claimant or his witnesses to swear to its being the same. This was the fact in three cases mentioned by Mr. *Wills*, (*c*) in one of which, the accused, though innocent, was convicted and sentenced to transportation. (*d*)

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(*a*) See *ante*, p. 560.

(*b*) 8 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) Note 298, p. 481.

(*c*) Anon. cited as "A. R. 1830, p. 50." *Rex v. Webster*, Burnett's Crim. Law of Scotland, p. 558. *Rex v. Carter*, coram Mr. Baron Garrow; *Wills*, Circ. Evid. 105—107.

(*d*) *Rex v. Carter*, *ubi supra*. So, in *Thomas Harris'* case, the money which the accused was seen to bury, was proved to have been his own. Theory of Pres. Proof, Appendix, case 3.



Supposing the article found, to have been originally stolen, the following infirmative suppositions are applicable as reasonable possibilities in the case.

It may have been purchased, borrowed or received as a gift from the thief himself, *in ignorance* of his character, and of the manner of its acquisition by him. Or it may have been purchased, borrowed or received from a person who, ignorantly or even knowingly, purchased or received it from the thief. The possibilities of this explanation according with the truth of the case, are increased with the length of the interval which may elapse between the time of the theft and the finding, allowing of opportunities for the article to pass repeatedly from hand to hand. (a)

It may have been clandestinely introduced by the *real thief*, into the premises of the possessor, or even attached to his person, without his knowledge, either for the purpose of self-exculpation, or with a malicious design to injure, or from the influence of both motives in combination. The case of *Jennings*, already mentioned, was a remarkable instance of this species of fabrication by the real criminal, at the cost of an innocent man's life. (b)

It may have been innocently received by the possessor, directly from the hands of the thief, and immediately after the commission of the crime, in consequence of *misrepresentation* and *fraud*; as where he has been requested by the thief, (who has been pursued and is seeking the means of escape,) to take charge of the article for him, for a short time; or to do something with it, for or without compensation; and the criminal, having by this means rid himself of the encumbrance of the article, is enabled to escape. The case of the horse-thief, mentioned by Lord *Hale*, (c)

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(a) See the reasons, before given, for the rule requiring the possession of stolen goods to be *recent*. *Ante*, p. 447.

(b) *Ante*, p. 425. See also the case of *Du Moulin*, Chambers' Edinb. Journ. for Oct. 28, 1887.

(c) 2 Hale's P. C. ch. 89, p. 289

and the modern case of *Rex v. Gill*, (a) are instances of the successful employment of an artifice of this kind.

It may have been introduced into the party's possession by the use of *force and fraud* combined. Mr. *Bentham* supposes a case (a barely supposable one, it is true,) where three men unite in a conspiracy against an innocent person: one lays hold of both his hands; another puts into his pocket a stolen handkerchief, which the third, running up, during the scuffle, finds there. (b)

It may have been taken by the possessor from a person whom he *himself* knows or suspects to have stolen it, and kept with the view of seeking out the true owner, in order to restore it, or of bringing the thief to justice. (c)

It may not be a case of *exclusive* possession by the accused; (d) as where the place in which the article has been found, is proved to have been occupied or frequented by other persons; or to be, in its nature, easily accessible to others. The cases of a house or room occupied by other inmates (domestics, lodgers or visitors,) besides the proprietor or principal occupant; and of an unlocked bureau, or trunk or other repository equally accessible, present instances where this supposition would have full application. In the French case of M. *D'Anglade*, this obvious consideration was wholly overlooked, to the ruin of the innocent accused. (e) "Nothing," observes Mr. *Bentham*, "can be more persuasive than the circumstance of possession commonly is, when corroborated by other criminative circumstances: nothing more inconclusive, supposing it to stand alone. Receptacles may be contained one within the other, as in the case of a nest of boxes: the jewel in a case; the case in a box; the box in a bureau; the bureau in a closet;

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(a) Surrey Summer Assizes, 1827: Wills, Circ. Evid. 54.

(b) 3 Benth. Jud. Evid. 89.

(c) Best on Pres. § 226.

(d) See *ante*, p. 450.

(e) 5 London Legal Observer, 281

the closet in a room ; the room in a house ; the house in a field. Possession of the jewel, *actual* possession, may thus belong to half a dozen different persons at the same time : and as to *antecedent* possession, the number of possible successive possessors is manifestly beyond all limit." (a)

Lastly, supposing the accused to be in reality not free from guilt, his crime may have been a very different one from that inferred from the possession of the property. Thus, supposing a murder to have been committed near a road, and the dead man's watch to be found, soon after, in the possession of the accused, and allowing the usual inference to prevail, its effect is to connect him with the murder. But the fact may have been that the accused, while passing along after the crime had been committed, and seeing the deceased whom he supposed to be intoxicated, robbed him. In a case which grew out of the case of *Rex v. Downing*, (b) this circumstance was shown to have been the actual fact. So the offence actually committed may have been that of having received stolen goods with a guilty knowledge of their having been stolen ; and not larceny, with which the accused is charged. (c) In a case cited by Mr. Wills, four persons were found guilty of house-breaking, on proof of the recent possession of stolen goods ; but it was afterwards ascertained that one of them, who had long been known as a receiver of stolen goods, knew nothing of the robbery until after it had been committed, and had purchased the goods from the real thieves the day after the robbery. He very narrowly escaped execution. (d)

#### 14. *Sudden change of life or circumstances.*

The infirmative consideration applicable to this fact is a very obvious one, and will not require to be dwelt upon. A

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(a) 3 Jud. Evid. 89, 40.

(b) Wills, Circ. Evid. 187, 189.

(c) Best on Pres. § 227. Wills, Circ. Evid. 55.

(d) *Id. ibid.* citing *Rex v. Ellis*, Sessions Papers and A. R. 1831

sudden accession of wealth may come, and sometimes does come from sources wholly unconnected with crime. An unexpected succession to an estate, or an unlooked for legacy, has occasionally elevated an individual from a state of abject poverty to positive affluence. It has already been mentioned, (a) that, by the civil law, the suddenly becoming rich was not even *primâ facie* evidence of dishonesty against a guardian; (b) "and it is now," observes Mr. Best, "perfectly understood in our criminal courts, that it is not, when standing alone, any ground for putting a party on his defence,—however the principle may occasionally have been violated by inferior tribunals." (c) The fact that the circumstances of a particular person have become suddenly improved soon after the commission of a robbery or murder, presents a mere *coincidence* of two events, which may in reality have no connection whatever; and it has already been shown that even numerous coincidences, much closer and more minute than this, do not, without other evidence, afford conclusive proof of guilt. (d)

15. *Giving different and inconsistent accounts of the cause of the death of a person.*

In addition to the general infirmative considerations applicable to all oral statements of one person in the hearing of another, namely, those of misunderstanding and inaccurate remembrance on the part of the hearer and witness, (e) this fact may be explained, consistently with the innocence of the accused, on the supposition of the statements being merely *conjectural*, without any claim to the

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(a) *Ante*, p. 459, note (d).

(b) *Cod.* 5, 51, 10. Voet *ad Pand.* lib. 22, tit. 8, n. 14.

(c) Best on Pres. § 288, citing 2 Evans' Pothier on Obl. 345.

(d) See the supposed case of a purse and its contents, lost and found, put by Mr. Starkie, (1 Stark Evid. 497, 499, note,) and considered on a former page, (*ante*, pp. 169, 171,) and which Mr. Best cites as illustrative of the inadequacy of this species of evidence.

(e) See *ante*, pp. 544, 545.

character of accurate information ; or on the supposition of the information having been received from *various* persons, and at different times, or obtained from mere general report.

16. *Objecting to the examination of a dead body.*

The infirmative supposition applicable to this fact has already been mentioned. (a) The objection, especially in the case of a near relationship to the deceased, may arise from a natural feeling of *repugnance* against having the body of a friend subjected to anatomical examination, particularly of that searching character (involving the absolute destruction of portions of the body,) which is essential to the verification of suspicions of poisoning. The existence of this feeling has been referred to, as a known fact. (b)

17. *Refusal to look at a dead body.*

This circumstance, also, may be explained on the supposition of a natural feeling of *repugnance*, (which cannot be pronounced uncommon in its occurrence,) against looking at the body of a person who has come to a violent end ; especially if in a bleeding, mangled, mutilated or decaying state. The circumstance next mentioned serves to explain, in a great degree, the reason of this.

18. *Agitation on looking at a dead body.*

There are several instances on record, in which this feeling has been visibly manifested in the strongest form, by persons who were wholly innocent, and satisfactorily proved to have been so. In the melancholy case of *William Shaw*, it was relied on as a strong circumstance against the accused, that, on coming into the room where his daughter lay, a bleeding corpse, and seeing a number of persons there who had forced an entrance, on hearing groans, he turned pale, trembled and

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(a) *Ante*, p. 461.

(b) *Wills, Circ. Evid.* 75.

seemed ready to sink. But after his execution, it was proved to have been a clear case of suicide. (a) The same circumstance occurred in the case of the Dublin surgeon, referred to on a previous page. (b) Actual fainting has sometimes been produced by the excessive agitation experienced on such occasions, and even by the mere recollection of the appearance of the body. In *Bell's* case, the father of the deceased, on attempting to testify as to the state in which he found his son's body, fainted twice in the witness box, and had to be carried out of court. (c)

#### 19. *Alarm in view of discovery.*

This circumstance, although in many, and perhaps most cases, reasonably indicative of guilt, is not, in its nature, by any means, inconsistent with the fact of innocence. Supposing a case in which a number of seemingly important physical facts have been *fabricated*, with the express view of criminating a person; and that he, having discovered their existence himself, has no means of preventing their discovery by others, or of adequately exposing the fraud; alarm, in such a position and emergency, would be a natural emotion. So, a weak or ignorant person might be led to over-rate the effect of circumstances, really immaterial, but seemingly tending to criminate him; and by the exhibition of needless alarm in consequence, actually create against himself evidence to strengthen the force of these very circumstances.

#### 20. *Concealment and flight. (d)*

These important criminative circumstances may be explained by the following infirmative considerations.

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(a) Theory of Presumptive Proof, Appendix, case 8, p. 94.

(b) See *ante*, p. 871, note (a).

(c) 1 London Legal Observer, (Monthly,) 818. In this case, the prisoner, who was only fourteen years of age, was indicted for the murder of another boy, and found guilty.

(d) These circumstances are considered by Mr. *Bentham* under the some-

The act observed and construed into an act of concealment or flight, may, in reality, possess no such character, being wholly unconnected with crime of any kind. It may be one of those *ordinary* cases of simple change of residence in the same community or vicinity, or of departure from it, in pursuit of health, business or pleasure, which are constantly occurring in all communities. (a) The fact that such an event is observed to take place, immediately or soon after the commission of a crime in the same vicinity, presents merely a *coincidence* of events, which might be equally applicable to a dozen other individuals.

But, supposing it a case of actual *concealment* or *flight*, in the proper judicial sense,—that is, supposing it a case of removal or departure, or, (to use the most comprehensive term,) of disappearance, induced or impelled by a *fear of the power of the law*,—it may have arisen from a source wholly unconnected with the *particular* crime charged; such as a desire to avoid the service of civil process, or the inquiry into some other offence. (b)

Finally, supposing that the observed act of departure or disappearance, on the part of a suspected person, was actually caused by a desire to avoid the charge of having committed the crime which has been discovered, even this circumstance, though proved ever so clearly, is, in itself, by no means conclusive evidence of guilt. (c) Under certain circumstances, the most innocent person may deem a judicial trial too great a risk to encounter. (d) The existence of a strong public feeling against him, however unfounded, presents an urgent reason for withdrawing out of the reach of such an investigation. In several cases on record, persons

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what uncouth title of “avoidance of justiciability,” which Mr. Best has modified into “evasion of justice.” 8 Benth. Jud. Evid. 170. Best on Pres. § 244.

(a) 8 Benth. Jud. Evid. 175—177.

(b) *Id.* 180.

(c) Best on Pres. § 246.

(d) *Id. ibid.*

who were afterwards shown or declared to have been innocent of a criminal charge, have endeavoured to protect themselves against it, by adopting (and sometimes injudiciously,) measures of this evasive character. In *Coleman's* case, the crime which had been committed was an atrocious one, and excited a strong desire for the apprehension and punishment of the perpetrators. The prisoner, having been charged, (partly in consequence of his own folly,) with being concerned in the transaction, was brought before a magistrate; who, however, was so far convinced of his innocence, that he allowed him to go at large, on bail to appear at the next assizes. But the coroner's inquest having, in the meantime, brought in a verdict of "guilty" against him, he became alarmed at the prospect of the danger attending a trial in the excited state of public feeling, and fled. Being subsequently apprehended, he was tried, convicted and executed. It was afterwards proved that he was entirely innocent; the crime having been committed by other persons. (a) The same circumstances of flight to another state and concealment there, were proved against the prisoner in *Avery's* case, which, however, resulted in a verdict of acquittal. (b)

*Disguise* of the person and the assumption of a *feigned name*, being merely auxiliary expedients adopted in order to carry out the main purpose of concealment, are subject, for the most part, to the same infirmative considerations.

21. *Conduct and language on arrest. Fear as expressed by deportment.*

The physical and visible evidences or symptoms of emotion

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(a) 5 London Legal Observer, 880, 881. It is to be observed, however, that the flight of the accused was not the only deceptive circumstance in the case. The falsity of the verdict was chargeable, mainly, to the direct (though mistaken) identification of his person, by the woman who had been the victim of the injury.

(b) *The State v. Avery*, before the Supreme Court of Rhode Island, May, 1833; testimony of *Harvey Harnden*.



on arrest, were enumerated on a former page. (a) The force of these manifestations, as criminative circumstances, depends on the correctness of the inference that the particular symptom observed has been produced by the emotion of *fear*; that is, of fear of detection, or punishment for the offence charged. (b) They may be considered as subject to the following infirmative considerations.

The appearance observed may not be the effect or manifestation of any *mental* emotion whatever, but of a purely *physical* fact; namely, bodily indisposition. (c)

The appearance may be the effect of mental emotion, but of a *different* emotion from that inferred; such as astonishment, anger or grief. (d)

Supposing the appearance observed to be actually the effect of the emotion of *fear*; that emotion may be referable to other causes than a consciousness of *guilt*. Thus,

It may arise from a consciousness that appearances are against the party, and a consequent apprehension that he may be subjected to judicial annoyance and vexation, or possibly condemned as guilty, although innocent. In the French case of M. *D'Anglade*, where a rouleau of louis d'ors, claimed to be part of a larger sum of which the Count of Montgomery had been robbed, was found in a trunk in the attic story of a hotel occupied jointly by the count and the accused, the latter was directed by the Lieutenant of Police, (who had, from the first, conceived a suspicion against him,) to count the money. Terrified at the imputation of guilt, and the prospect of the fatal consequence which in France, at that time, often followed the imputation only, his hand trembled as he counted the money. He was sensible of it, and said "I tremble." This natural emotion appeared in the eyes of his accusers a corroboration of his guilt, and was effectually used in procuring his condemnation and ruin :

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(a) *Ante*, p. 476.

(b) Best on Pres. § 249.

(c) 3 Benth. Jud. Evid. 156.

(d) Best on Pres. § 250. See *ante*, pp. 476, 477.

although it was afterwards proved that the robbery had been committed by the count's own almoner, with the aid of an accomplice. (a)

It may arise from an apprehension that a fact which has no criminal character whatever, will be publicly exposed, to the injury, mortification or vexation of the party himself, or some other individual connected with him by some tie of sympathy. (b)

Supposing, finally, that the appearance observed is not only, in truth, the effect of the emotion of *fear*, but that such emotion arises from a consciousness of *guilt*, the following supposition may be applicable.

It may be a consciousness of some *other crime*, committed either by himself, or by some other individual connected with him, and on whom the inquiry may bring down suspicion or punishment. (c)

*Confusion* manifested on being charged with participation in the commission of a crime, or questioned as to some circumstance connected or supposed to be connected with it may arise from a feeling of mortification at the discovery of a fact supposed to have been known only to the party himself. In *Harris'* case, one of the principal circumstances on which the accused was convicted was, his having been seen to bury some gold in a stealthy manner, the same morning on which the deceased was found dead, (and supposed, though erroneously, to have been murdered) in his house; and that, on being questioned in regard to it, he manifested much confusion and hesitation. The fact was that the money was his own, and that, being of an avaricious disposition, he had a *habit* of *burying* his money in the manner which had been observed; the exposure of which habit and fact produced the emotion manifested. (d)

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(a) 5 London Legal Observer, 231—234.

(b) 3 Benth Jud. Evid. 157. Best on Pres. § 250.

(c) *Id. ibid.*

(d) Theory of Presumptive Proof, Appendix, case 3, pp. 75—77

The apparently strongly criminative fact of *resisting a search* of the person may arise from a similar feeling. A story related by Mr. *Bentham*, as one which he had often heard or read of, may be repeated in his own language, as an illustration of this supposition. "An entertainment was given by some great personage to a numerous and mixed company: in the course of it, a trinket was displayed, the value of which had, by I know not what operation of the principle of association, been raised, in his imagination and affections, above all ordinary estimation. On a sudden, an alarm was given that the precious article was missing. 'Let every man of us be searched,' said one of the company. 'Yes, let every man of us be searched,' said all the rest. One man alone refused: the eyes of all were instantly upon him: his dress betrayed symptoms of penury: no doubt remained about the thief. He entreated and obtained of the master of the house a moment's audience in a private room. His pockets were turned inside out, when in one of them was found—not the lost trinket, but something eatable. He had a wife who, for such or such a time, had gone without food." (a) This was a secret, the public exposure of which he had resisted.

## 22. *Silence under accusation.*

This circumstance is subject to the following infirmative considerations.

The accused or suspected party, owing to deafness, or any other cause, may not have *heard* the criminative question asked, or observation made. (b)

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(a) 3 Benth. Jud. Evid. 88, 89. According to the story, as the writer of the present work has seen it somewhere related, it further turned out that the trinket had not been taken by any one, but had been put aside by the owner or one of the company, in some temporary and unusual place of deposit, where it was wholly overlooked and forgotten, and where it was, long afterwards, found.

(b) Best on Pres. § 241. *Shaw, C. J. in Commonwealth v. Kenney*, 12 Metcalf, 287.

If he heard it, he may not have *understood* it as conveying an imputation against himself. (a)

If he heard and understood it, he may not have been *able* to reply at the moment, owing to temporary impediment of utterance, or a feeling of surprise at the imputation conveyed. (b)

The subject of the statement may have been a matter not within his *knowledge*. (c)

The statement may have been made under circumstances *not calling for a reply*. (d)

The statement or question may have been made or put by a person whom he did not feel *called upon to notice*. (e)

The statement may, in itself, seem reasonably to call for a reply or remark of some kind, and yet the party may *not have felt at liberty* to make it. (f) He may have been conscious that, although innocent, appearances were against him; and yet have been reasonably apprehensive that if he attempted or undertook to speak, he might in the confusion natural in such an emergency, unintentionally drop an expression which would be used against him, and possibly with disastrous effect.

### 23. *Evasive and incomplete response.*

The following infirmative considerations may be mentioned under this head.

It may be a case where the appearance observed, and required to be explained, such as blood on the clothing, although criminative on its face, was not so in fact; but the accused having been subjected to it without his knowledge, as by having come in contact with a bleeding body in the

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(a) *Id. ibid.* Best on Pres. § 241.

(b) See *ante*, p 488, note (c).

(c) *Shaw, C. J in Commonwealth v. Kenney*, 12 Metcalf, 287. *Robinson v. Blen*, 20 Maine, 109.

(d) *Shaw, C. J. in Commonwealth v. Kenney, ubi supra.*

(e) *Id. ibid.* 3 Benth. Jud. Evid. 92, 98.

(f) *Shaw, C. J. ubi supra.*

dark, was, although innocent, actually *unable* to explain its existence. (a)

It may be a case where the accused, though innocent, could only explain particular circumstances, by criminating *other* individuals whom he was unwilling to expose, or disclosing facts which, he was anxious, if possible, to conceal. (b)

It may be a case where the accused, though not guilty of the offence charged, could only prove himself so by showing his guilt of some *other* offence. (c)

It may have been considered by the accused his best policy not to disclose the particulars of his defence, until *judicially* demanded of him on his trial. (d)

#### 24. *False response.*

The following infirmative considerations may be mentioned under this head.

The alleged false statement may have been *misunderstood* or misreported by the witness. (e)

Supposing it to have been false in fact, as reported, it may be attributable to the same cause which has sometimes led innocent persons to resort to *false evidence* in their defence, as by actually fabricating facts and appearances, in order to produce false impressions. (f)

#### 25. *Indirect confessional evidence.*

The following infirmative considerations belong to this head.

The supposed confessional statement may be, either wholly or in part, a *fabrication* of the deposing witness. It is remarked by Mr. *Best*, in regard to testimony as to statements of this character, that, of all testimony, it is "the most easily fabricated and the most difficult to disprove; for, from its very nature, it is seldom possible to confront and expose its

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(a) *Ante*, p. 542. *Best* on Pres. § 242.

(b) *Id. ibid.*

(c) *Id. ibid.*

(d) *Best* on Pres. § 242.

(e) *Id.* § 248.

(f) *Id. ibid.* See *ante*, p. 557.

falsehood by positive, or indeed, even by presumptive evidence." (a)

The supposed confessional statement or observation may have been imperfectly or inaccurately heard, and in that way *misunderstood*, and, thus, although unintentionally, misreported by the witness. One or two cases illustrative of this possibility may be mentioned. In *Coleman's* case, there were two different accounts given of a particular expression said to have been made use of by the accused, in answer to a question whether he was not one of the parties concerned in the commission of a certain offence: one saying that his words were, "Yes I was, and what then"? and the other, that they were, "If I was, what then?" (b) In the case of *Rex v. Simons*, (c) where the prisoner was indicted for a capital offence, a witness was called to prove that, as he was leaving the committing magistrate, he was overheard to say to his wife, "Keep yourself to yourself, and don't marry again." But another witness stated the words to have been, "Keep yourself to yourself, and keep your own counsel." The wide difference between these expressions was referred to by *Alderson, B.* in the case, as showing how little reliance ought to be placed on such evidence. (d)

The supposed confessional statement or expression may have been actually uttered as heard and reported, but misinterpreted by having been understood to apply to the act which is the subject of accusation, whereas it was uttered in reference to *another act*. As where a man who has robbed or beaten another, on hearing that he has since died, utters an exclamation of regret at ever having had any thing to do with him. (e)

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(a) Best on Pres. § 272.

(b) See the case as reported by Mr. *Wills*, Circ. Evid. 68. And see *infra*.

(c) 6 Carr. & P. 540.

(d) *Id. ibid.*

(e) Best on Pres. § 272, p. 848.

The supposed confessional statement or expression may have been uttered as heard and reported, and not misunderstood in its application, so far as it was heard; but has been productive of a false impression, owing to the *want* of some *explanation* which the speaker either neglected to give or was prevented from giving, through interruption, &c. As where a man was heard to say, and did say, "I killed A. B." but did not add, what he meant to have added, that it was in self-defence; or, in case of larceny, was heard to say, and did say, "I took the goods of the prosecutor," but omitted to add that he did so under the belief that he was justified in so doing, &c. (a)

The supposed confessional statement or expression may have been uttered as heard and reported, and not misunderstood from any of the causes above mentioned, and yet may have produced an erroneous impression on the witness, though without fault of any kind on his part. The expression may have been uttered in *jest* or by way of *bravado*, (b) or in the rash and careless manner of intoxicated persons. *Coleman's* case may be again referred to, under this head. The prisoner being suspected of having been concerned in a brutal assault upon a woman, which resulted in her death, a person deposed that he met him at a public house, and asked him if he knew the woman who had been so cruelly treated, and that he answered "Yes, what of that?" The witness said that he then asked him if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes, I was, and what then?" or, according to another, "If I was, what then?" This language, in connexion with other circumstances, induced the jury by whom he was tried, to convict him, and he was executed. But it appeared that he was intoxicated at the time of using these expressions, and that the questions were

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(a) Best on Pres. § 273.

(b) *Id.* § 272.

put with the view of ensnaring him. And it also appeared afterwards that he was entirely innocent of the charge. (a)

In connection with this subject, it may be further observed, that even direct and full confessions of crime, accompanied by a minute relation of particulars, have been made by persons who were, nevertheless, entirely innocent. The case of the *Perrys* mentioned in a previous note, (b) and the Vermont case of the two *Boorns* (c) are remarkable

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(a) Wills, Circ. Evid. 68.

(b) See *ante*, p. 215, note (d).

(c) These persons were convicted, in the Supreme Court of Vermont, in Bennington County, in September Term, 1819, of the murder of *Russell Colvin*, May 10, 1812. It appeared that *Colvin*, who was the brother-in-law of the prisoners, was a person of a weak and not perfectly sound mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that, on the day of his disappearance, being in a distant field where the prisoners were at work, a violent quarrel broke out between them; and that one of them struck him a severe blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time, that he was murdered; which were increased by the finding of his hat in the same field, a few months afterwards. These suspicions, in process of time subsided; but in 1819, one of the neighbors having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of *Colvin* and a button of his clothes, were found in an old open cellar in the same field; and, in a hollow stump, not many rods from it, were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with a deliberate confession by the prisoners, of the fact of the murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day, they applied to the legislature for a commutation of the sentence of death to that of perpetual imprisonment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, *he was found* in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. The prisoners had been advised by some misjudging friends, that, as they would certainly be convicted upon the circumstances proved, their only chance for life was by commutation of punishment; and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. 1 Greenl. Evid. § 214, note 2, which see for further observations and references on the subject.



instances of self-crimination carried to this extent. Mr. *Best* has enumerated no less than twelve classes of motives which may lead, or actually have led to false confessions. (a)

26. *Demeanour during trial.*

The infirmative considerations applicable to this circumstance have been mentioned in treating of it as an element of criminative evidence. (b)

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(a) Best on Pres. §§ 259—270.

(b) See *ante*, p. 502

## CHAPTER II.

**FACTS OR CIRCUMSTANCES, CONSIDERED AS CONSTITUTING BODIES OF EVIDENCE; INCLUDING A VIEW OF THE PRINCIPLES UPON WHICH THEY ARE APPLIED TO THE PURPOSES OF PROOF, AND THE PROCESSES INVOLVED IN SUCH APPLICATION.**

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IN the preceding chapter, the principal *criminative* facts or circumstances which constitute the elements or materials of circumstantial evidence, have been separately enumerated and classified, and their *individual* probative force commented on. The principal *exculpatory* circumstances, whether requiring to be actually proved, or reasonably subject to be supposed, which may be used to rebut or qualify the former, have also been presented. It remains to explain how these circumstances and considerations are practically applied to the purposes of *proof*, or made available as proof in particular cases. This may be summarily described as effected by connecting and combining them into *bodies* of evidence,—a process, the course and method of which, as developing the essential principles upon which it is conducted, together with some other considerations, will be made the subject of particular illustration in the following sections.

## SECTION I.

*The process of constructing a body of Evidence out of Circumstances, considered as developing the essential Principles upon which its efficacy as proof depends.*

The fundamental principle upon which a body of circumstantial evidence is constructed and applied to the development of truth, is expressively indicated, at the outset, by the radical meaning of the word "circumstance" itself. It is exhibited in the relation or *relative position* of certain known facts, termed, from their inferior individual importance, *minor* facts, towards another and unknown fact, which from being formally proposed as the single object of proof, is termed the *principal* fact; (a) such relation giving to the former a certain significance and power in developing the latter. This relation, being capable of being established on *all sides* (as it were) of the principal fact,—that is, by facts preceding, accompanying and following it, or rather, the overt act which it embodies and represents,—the minor facts themselves are represented by the expressive figure of *standing around*, or surrounding the other; and hence derive their name of "circumstances." (b) In the process of proof, the principal fact being placed in this assumed central position, the circumstances are grouped around in their supposed appropriate relative positions; each being allowed its natural and reasonable meaning or significance. This relative significance may be expressed by the simple figure of *lines* of indication, proceeding from each circumstance. If all these lines, thus formed, are found to *converge*, without variation, upon the point occupied by the principal fact, they at once establish its existence; it being literally indicated or *pointed to*, as the required truth. If, however, they do not converge

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(a) See *ante*, pp. 8, 121 and note (d) *ibid.*

(b) See *ante*, pp. 8, 121 and note (d) *ibid.*

upon any one point, or if the point upon which they converge is a different one from that occupied by the principal fact, or if they are found to converge as readily upon the one as the other, no conclusion as to the truth of that fact can be formed by the process.

In the application of circumstantial evidence to the judicial investigation of the truth of criminal charges, the principal or central fact just spoken of is the crime supposed and charged to have been committed; the truth of such charge being formally proposed as the subject of trial. And this fact always presents itself as compounded of two others:—a *crime* committed by some responsible agent,—and that agent, the individual judicially charged in the case, or *the prisoner* at the bar. To both of these component facts, the indicatory circumstances are applied in the same general way. Sometimes, they present subjects of investigation which are so far distinct, as to require being proved by different sets or combinations of circumstances. In other cases, they are found to be so intimately united, that the same set of circumstances avails as proof of both. (*a*)

The proof of the general fact of a crime committed, or *corpus delicti*, (as it is technically termed,) is sometimes a short and simple process; the circumstances being few, but cogent in their indications, and the conclusion sought, manifest and irresistible. A cry of distress is heard from a building or apartment, followed, successively, by sounds as of a mortal struggle and a heavy fall. The place is entered as quickly as possible, and a person is found extended on the floor, dying from mortal wounds visibly inflicted with a sharp instrument, in such a part of the body, or in such numbers or directions, as to forbid the supposition of suicide, and the instrument itself is no where to be found. In other cases, as of death by poisoning or strangulation, and where the body is not found until sometime after death, the proof

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(*a*) See Best on Pres. § 201, p. 270.

of a *corpus delicti* is frequently a delicate process, and accomplished with more or less of difficulty. (a)

But leaving, for the present, the particular proof of this preliminary and fundamental fact, or supposing it proved, and returning to the general view just taken, of minor facts in their relative position as surrounding a principal fact, the process of *aggregating* these elementary circumstances into a body of evidence may be most conveniently illustrated by beginning with a single circumstance, and adding to it another; and so proceeding gradually by a succession of additions, (the informative considerations being presented and disposed of, as they successively arise, in the course of the process,) until the requisite amount of proof is considered as attained.

Before entering, however, into the details of this process, there are some views of the general course, character and object of judicial inquiry into crime, which appear to claim attention. The original basis of all the investigation which is undertaken, is the case or transaction, *as it actually occurred*; composed, in addition to the principal act of the crime itself, of a variety of circumstances,—precedent, concomitant and subsequent,—of physical facts, psychological facts, and facts of conduct,—all consistent with each other, (b) and all connected with each other and with the criminal act, (c) in a certain order and relation. This is the case or transaction, in its *absolute* form of reality and truth.

But this transaction, having had only a transient existence, has passed away. (d) Much of it, as it occurred, was enveloped in obscurity purposely created by the criminal agent himself. An occasional or detached constituent element or circumstance may have fallen under the notice

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(a) See farther on this subject, *post.* p. 677.

(b) 1 Stark. Evid. 20, 482. 1 Greenl. Evid. § 12. *Ante*, p. 84.

(c) 1 Greenl. Evid. § 12.

(d) 1 Gilb. Evid. 2. 1 Stark. Evid. 15, 23. *Ante*, p. 95.

of a contemporaneous observer ; (a) but as a whole, in its full character and extent, and in the true relation of all its parts, it was unknown to any human being besides the perpetrator, (supposing it the work of a single agent,) and none but he can fully represent it in a narrative of the past. It has, however, left *traces*, more or less numerous, consisting of physical objects and appearances, (some still existing *in specie*,) and contemporaneous impressions made on the senses and memories of individual observers. The great object of all investigation is to collect these scattered *remnants* and *vestiges* of action ; to examine and compare them ; to adjust them to each other, by means of indications which they themselves immediately furnish, as well as by the aid of general principles of presumptive reasoning ; to ascertain, as it were, their original places and positions ; and, by this means, to *re-construct* the case, as far as possible out of them ; to *recall* it from the past, and to present it as a subject for consideration, in a state of as close approximation to the form of its original occurrence as may be practicable. (b) The more adequately this is done, the more easy does the process of investigation become, and the more accurate are the conclusions ultimately reached by it.

The moment a crime is discovered or suspected to have been committed, this process may be said to begin ; and its general course through the different instrumentalities legally provided for the purpose, may be briefly noticed. In its earliest stage, it often happens that it is conducted in the most informal, irregular and even careless manner. The *physical* traces of action, particularly, although then most recent and abundant, and of proportionate value, are left open to the indiscriminate notice, handling and disposal of casual observers. (c) It is not until medical examinations and coroners' inquests (when applicable to the case,) come

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(a) See *ante*, pp. 98, 100.

(b) See *ante*, p. 95. 1 Stark. Evid. 28.

(c) See *ante*, pp. 140, 141, 142 and note (a) *ibid*.

to be held, that the investigation assumes any character of formality or precision. The original observers of the facts are then sought for, and made witnesses, and through them the facts become, for the first time, converted into evidence. At the next stage, the investigation is carried on with stricter form. The public prosecuting officer now assumes the direction of the proceedings, a wider range is given to inquiry, the evidence of the witnesses already known is noticed and preserved, and that of others is sought for; the case is submitted to the examination of a grand jury, who are attended by the witnesses; and, under their approval, a formal accusation or indictment is drawn up and preferred against the prisoner. Last of all, and at the farthest remove from the case as it occurred, and subject to some disadvantages on that account, (a) but combining the results of all the previous examinations, comes the *trial* itself; affording, under the technical form of an issue, the widest possible range for inquiry and discussion, and the freest scope for examining the facts in every possible light, and extracting from them the truth as to the guilt of the prisoner, which is now formally proposed as the *factum probandum* of the case.

The particular manner in which the elements of circumstantial evidence are laid before a jury, will be again adverted to. But the development of the essential principles involved in the process of proof by this means, may be more adequately explained by going back to an earlier stage of investigation, and supposing the facts to be presented in the more gradual course of their original discovery.

Taking, then, for the subject of investigation, a case of murder, the following may be supposed to present the *corpus delicti*, as fully proved. A woman has been found at night,

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(a) It is a familiar truth that not only the physical facts of a case, but the impressions made upon the senses and memories of observers, are exposed to the hazard of change and obliteration by lapse of time. The testimony of a witness, as given on a trial, is sometimes found to vary materially from that delivered by the same witness before a coroner's jury.

dead in her bed, with several wounds on the head, apparently inflicted with a hatchet or similar implement, and the bed itself partially consumed by fire. In the effort to discover the perpetrator of this offence, the following series of facts may be supposed to appear. On examining the premises, during the night, and soon after the discovery of the crime, a man's hat or cloak is found on the ground in the rear yard of the house. This is a fact of the strictly physical class, presenting the first trace of the particular human agency sought for, and so proximate, in point of time and place, as to claim to be taken into careful consideration, as a possible means of throwing light on the transaction which has occurred. The fact has not only a *meaning*, but, under the circumstances, it *demand*s explanation and an interpretation of some kind or other. The questions which immediately and naturally suggest themselves, in reference to the article found, are ; "How came it to be there ?" and "what does it mean ?" Viewed with reference to its *ordinary* uses, it indicates, as the reasonable cause of its existence, the presence of *a man* at the spot where it was found. But the fact has a more important aspect than this. The *extraordinary* position of the article gives to it an extraordinary character, indicating, as its immediate cause, the existence of some *unusual* occasion, and a correspondingly unusual condition on the part of the supposed wearer. According to the known habits of men, the article would not be thus disposed of by its wearer, unless under the pressure of some strong emergency, such as a desire to escape from the spot with the least delay ;—the article being either dropped by the party in his haste, or intentionally thrown off to facilitate rapidity of movement. In its *character*, therefore, the fact corresponds with the extraordinary occurrence of the crime itself ; and its physical *juxta-position* to the scene of crime presents another reason for associating them together. The principal fact of the crime affords the only means, yet known, of accounting for the minor fact just shown, and aids in giving



to it the interpretation sought, which is this :—that the wearer of the hat or cloak was present at the scene of the crime, on the night of its commission ; and that he escaped from it in haste, and by an unusual way, in order to avoid observation. But the fact thus discovered, and thus interpreted, is of no value unless it serves to suggest or indicate some *particular* individual as the agent from whose presence and conduct it emanated. Supposing, therefore, that, upon examination, the hat or cloak found is discovered to resemble closely an article worn by a certain individual, and is by some, confidently believed to be identical with it ; this fact, thus growing out of the other, serves to give it the particular character required ; and, by its means, the first effectual step is taken towards the desired object of *designating* the offender.

The fact, thus shown, and reduced from general to particular, tends to establish a *connection* between the individual apparently designated, and the crime committed, upon a principle which has already been explained as lying at the foundation of all presumptive reasoning as applied to human conduct. Placed in its proper position of *relation* to the general fact of crime, it begins to give it a new character and aspect, to draw it out into particulars, to convert it, in a certain degree, into the *compound fact* already described,—that the individual indicated committed the crime shown ;—and to *point towards* this fact, as the truth of the particular case.

But the process involved in the interpretation and connection just described, is only one of presumption, founded on *probability*. So far as the finding of the article in question is regarded as a purely physical fact, it implies, indeed, two successive presumptions or inferences : first, that the article actually belonged to, or was habitually worn by the individual supposed to be designated ; and next, that such individual was the person who wore it on the night of the

murder. Each of these is liable to be met by what has already been explained as an infirmative supposition ; or, in other words, the fact proved will, in both respects, admit of a construction *favorable* to the individual, as well as the unfavorable one which has been put upon it. The article may not be satisfactorily and fully *identified* ; or, if identified, it does not necessarily follow that it was worn by the individual on the occasion. *Another* person, really connected with the crime, may, accidentally or intentionally, have obtained possession of it and worn it. We have here, on one side, what must be admitted to be, in some degree, a probability of guilt, but so far balanced or qualified, on the other, by a reasonable possibility of innocence, as to afford no sufficient ground for any definite presumption against the individual seemingly indicated.

But, in the course of investigation, another fact of the same physical class, comes to light. A hatchet, with which a blow competent to have inflicted the wounds observed on the body, might have been given, and itself apparently stained with blood, is found (with indications of having been recently thrown there) in a corner of the yard of the premises, and not far from the spot where the other article was discovered : and this hatchet, also, is believed, or indeed proved to have belonged to the same individual. This is a still more important fact than the one already noticed. It indicates what is always necessary to be shown against any accused party,—the general fact of the *possession of the means* of crime ; while it presents the particular description of means competent to have produced the known criminal effect. It aids in confirming the fact of a *corpus delicti* ; and is, in turn, shown by that to have been a constituent fact in the case. But it is as an *identified* article that it establishes a distinct connection,—the second in the series—between the individual designated and the crime itself. Like the circumstance of the hat or cloak, it has a meaning,

and is susceptible of an interpretation ; and being like that, placed in its proper relative position, it points directly towards the *same compound fact*. Here is a *convergence* of two facts or circumstances towards the same point ; exhibiting the process of aggregation in its earliest stage, and the principle regulating it, in its simplest elementary form.

Viewed by itself, the supposed bearing and meaning of this last circumstance might be met and explained or avoided by the same species of suppositions as were applied to the first one ; going to show that the appearance observed might not, or, indeed, did not proceed from the cause assigned. The implement may have been mistaken for another ; it may have been accidentally thrown where it was found ; what has been taken for blood upon it may be nothing more than rust ; or, if actually the party's hatchet, possession of it may have been acquired by another person. But the fact of *convergent* and *united bearing*, which now, for the first time, presents itself as an element of proof, begins to show that this common determinate tendency from two distinct points upon another, is not accidental but must be due to the operation of some real, inducing cause, common to both. In other words, the probabilities that the assigned bearing and meaning of the two facts, in union, is the true and actual one, are now perceptibly increased and strengthened ; while the force of the infirmative possibilities employed to meet them is diminished and weakened in the same ratio. There is less room for the suppositions of accident and the act of another, than before.

Still, the latter are by no means excluded. There is room for a favorable construction of these two facts, even in their relative convergent position. It is possible that some unknown individual, (the real perpetrator,) might have got possession of *both* the articles, and left them where they were found. So far, therefore, no sufficient ground of a definite presumption of guilt can yet be considered as established.

But, as the investigation proceeds, a third fact is brought to light. The *individual* supposed to have been the owner or wearer of the article or instrument found, or, at least, a person strongly resembling him, and by some sworn to have been the same person, is ascertained to have been actually *on the premises* where the crime was committed, on the night of its commission. This is a more important fact than either of those yet discovered. Although, in one sense, a physical fact, like them, it is not merely and purely such. It not only emanates from human conduct, but is immediately and necessarily blended with it, and cannot be considered apart from it. It presents the *particular* human *agent* sought for, not presumptively and inferentially, as the other facts did, but directly and absolutely. It presents him as *possessing opportunity* to commit the crime; a fact always necessary to be made out against every accused party. It is, in short, emphatically a fact of *conduct*, and that of the most proximate kind.

We have thus far, then, three distinct connections, or lines or links of connection, indicated and traced out between the crime known and the individual sought to be charged with it. The force of these connections may now, for a moment, be dwelt upon. This consists not only in the circumstance that they all point and bear in *one* direction, but that they, at the same time, *tend toward each other*, and run together, (so to speak ;) giving to them that *convergence* upon one point, which has already been mentioned as being itself an essential element in the force of circumstantial evidence. This point, in the case of an original investigation of the facts, where the commission of the crime is clear, is the individual suspected or sought; and, in the case of a judicial trial, on evidence of such facts, it is the principal or compound fact already described, and which is formally proposed for proof. Again, the facts just considered as discovered not only tend together, in their direction; but, taken together and actually united in the mind of the ob-

server, they are found to *support each other*, giving and receiving strength, and thus developing a new element of power. Finally, as actually united, they are found to be *consistent*, not only with the supposition of guilty agency in the particular individual indicated, but also with each other; thus possessing another quality always belonging to what may be called the true facts of a case.

To return to the facts of the case, as supposed to be discovered or proved. The facts, thus apparently *united* as discovered, are reasonably supposed to have actually *occurred* in the *same* connection; and the interpretation which the discoverer and observer naturally give to them is this:—that the individual indicated was concerned in the commission of the crime: and that, seeking to escape by a back way, in order to avoid observation, he accidentally dropped his hat or cloak, in his haste, or purposely threw it off as an encumbrance to motion; and that the implement was disposed of in a similar way. This interpretation gives to each fact a natural meaning; and it is naturally adopted by the mind as the most reasonable one in the case; subject, however, to be modified or even wholly abandoned, in the event of the discovery of facts tending in an opposite direction. It is at this point of the investigation, that a probability and consequent *presumption* of guilt, on the part of the suspected or accused individual, may be considered as, for the first time, definitely formed; from the material accession of evidentiary force contributed by the fact last mentioned. Still, it is a presumption, and nothing more, or rather a grade of presumption, which however satisfactory to the general investigator, as a mere matter of *opinion*, yet, as a ground of *action* by the judicial investigator, in the way of convicting an individual formally accused, is confessedly inconclusive and insufficient. The probability on which it rests may still be met and qualified by the following infirmative suppositions. First, it may be a case of mistaken identity; the individual seen, so closely resembling the ac-

cused, as to be easily taken for him. But the force of this supposition is, on the other hand, weakened in a very material degree by the bearing of the two other associated facts previously discovered, which support the fact of identity as presumed, and cannot readily be accounted for on any other supposition. Next, conceding the point of identity, and that the individual supposed to have been seen was actually present, so long as an *exclusive* presence is not shown, it is possible that the crime might have been committed by another also present. But, here, again, the associated facts of the articles found present difficulties in the way of such an infirmative supposition. The fact of their connection with the accused, (on the suppositions of their identity and his innocence,) can be accounted for only on the supposition that the person who actually committed the crime had these articles clandestinely on the premises, having previously got possession of them without their owner's knowledge. But this, again, and in turn, is rendered improbable by the known fact of the owner's presence, (which would serve to give him an opportunity of observing the articles and detecting the fraud,) and the additional presumed fact of his presence at the particular spot when the articles were found. Still, there is room left for the following infirmative supposition, or rather hypothesis of the case, as it may, with stricter propriety, be termed, from its involving the assumption of *several* connected facts. The real criminal may have fabricated all the physical evidence hitherto discovered; and having possessed himself of the criminative articles, and finding the accused present on the premises, took advantage of that as a circumstance to aid his plans against him; and having waited until the accused had left the house, committed the crime and then threw the articles where they might seem to indicate the presence of the owner in the act of secretly making his escape.

But this whole hypothesis is subject to be overturned by a single additional fact. For, supposing it proved that the

accused, towards whom all the previously discovered facts uniformly pointed, was seen, on the night of the crime, leaving the premises, or their immediate vicinity, by an unusual way, as over a fence ; or in an unusual manner, as in great secrecy or in great haste ; or in an unusual personal condition, as without a hat ;—the case would be restored to the original criminative supposition that he did escape by the way indicated by the position of the articles, and that he dropped or threw them where they were found ; the coincidence in regard to the hat, if such were the article, materially increasing its probability. (*a*) At this point, the informative hypothesis, in order to be at all tenable, would have to be varied, and might be put in the following shape : that the accused, being on the premises at the very time of the commission of the crime, or soon after, and learning that fact, and fearing to be implicated in the transaction, fled precipitately from the house by the rear way, in order to escape observation, dropping the article of apparel in his flight ; and that the murderer, finding that he had escaped, threw the hatchet in the vicinity of the article, on purpose to add to its criminative effect. Or it might be put thus : that the murderer actually assaulted his victim in the presence or hearing of the accused, and that, on the latter's interfering, he was assaulted in turn, and compelled to escape as he did, in order to save his own life.

But, in the course of investigation and discovery which

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(*a*) In the Scotch case of *Stewart Abercrombie*, who was tried for the murder of Mr. *Hay*, in 1717, the following facts appeared in evidence. The prisoner being called by the deceased out of a room in a tavern where he was in company with others, went out *without his hat* ; and the two afterwards went out into the street, (the prisoner being still without his hat,) where a scuffle ensued, in which *Abercrombie* ran *Hay* through the body with his sword, the latter not having his weapon drawn. Some person in the street who witnessed the scuffle, saw a man *without a hat* stab another who wore one ; and a child having observed the hat which was left behind, it was shown to be *Abercrombie's*. The coincidence between these facts became a principal ground of the prisoner's conviction. Trial of *James Stewart*, 19 State Trials, 75—77.

has been supposed, additional facts are brought to light. The accused, when seen on the premises, was observed to wear a cloak similar to the one found, and appeared to have something concealed under it. This favors the idea that he may have thus concealed the hatchet which was found, and evidently used. In the course of further inquiry, a piece of string is found to have been attached to the handle of the hatchet. A piece of string is now found attached to the cloak, and these two pieces, on being brought together, are ascertained to be of precisely the same kind, showing that they were once *united*. This close physical coincidence converts the conjecture just mentioned into a reasonable presumption, amounting almost, if not quite, to a certainty. And the bearing of these last circumstances, taken together, reveals a new and most material fact ; showing that the accused went to the premises, *prepared* for the commission of the crime, and having adequate *means* of its commission, which means were actually used ; giving a vast accession of force to the facts previously mentioned, by developing the existence of a distinct element of guilt ; namely, a previous criminal *design*. The presumption of guilt has now acquired such force as to satisfy, probably, the majority of mere general observers, as to its truth. But the judicial investigator, on inquiring if there were any infirmative hypotheses left, might be presented with the following. Admitting the accused to have been guilty in intent, he may not have been guilty in act. His action may have been anticipated by another, equally guilty in intent ; who, having by some means got possession of the implement, committed the crime and then left, or compelled the accused to escape, as before supposed. With this, the stock of hypotheses favorable to the accused would finally be exhausted.

The circumstances which have thus far been supposed to be developed by a course of investigation, are almost exclusively those of the *concomitant* class. But in very atrocious cases, especially those in which the life of the accused



is likely to depend on the result of the inquiry, the mind is not always content with evidence of this character, but seeks for confirmation of its conclusions in circumstances derived from other and distinct sources. The course of presumption hitherto has been a process of *tracing* out the *causes* of observed appearances; and there is generally a disposition to carry this process a step further, by ascending to the ultimate *origin* of the whole transaction, and inquiring what could have induced or instigated the individual to whom the facts point, as the cause of the crime, to have committed it; or, in other words, what motive he could have had for it. Let it then be supposed that the investigation still proceeds, and that facts are developed in this required direction also. It is found that the individual in question had recently been on ill terms with the deceased, and had been heard to utter threats against her. Facts like these constitute moral coincidences, operating powerfully in aid of the physical ones already presented in the case; showing not only a disposition and aptitude, but the elements of an actual intention to injure the deceased. They thus converge, like all the other facts yet discovered, though from a greater distance, upon the compound fact which is the subject of investigation; and have a peculiarly important influence in singling out one individual from among several others who might be supposed to have had equal *opportunity* and equal *means* of committing the same crime.

In order to render the case, as thus hypothetically constructed, the more entirely convincing to the supposed investigator and observer, as well as to show how the central fact of guilty agency may be literally *surrounded* with evidentiary circumstances, let it next be supposed that the following *subsequent* circumstances are discovered. Upon search being made after the suspected individual, he is found to have fled. He is pursued, and with some difficulty apprehended. On being questioned, he denies his name and all knowledge of the deceased, or of the crime; but on being

searched, his name is found on various articles of his clothing, partially erased. A letter is also found from the deceased, requesting a meeting at the very time and place of the murder. On being interrogated where he was, on the night of the crime, he makes a statement which is found to be palpably false. On being committed to custody, he is detected in attempting to procure the destruction of the important physical evidence first discovered, and in endeavoring to prevail on a friend to have a false *alibi* sworn to, in his behalf.

The individual bearings of these last mentioned facts do not any longer require to be explained or dwelt on. It is enough that they all tend towards and converge upon the same central point or fact of guilty agency in the particular individual indicated, though from an entirely opposite direction ; showing, beyond all reasonable question, that this point or fact represents and is the actual truth, the discovery of which was, from the beginning, sought to be established.

The course of illustration, thus far adopted, exhibits the process of constructing a body of evidence out of elementary facts, in immediate connection with the collateral process of extracting its *meaning* by a course of *presumption*,—both being presented in the gradually progressive character which naturally belongs to them ; the presumption being applied to and deduced from the facts, at each successive stage of their increase, and growing up, with them, from the state of mere rudiments to the strength of complete moral demonstration. It is in this way, too, that the informative considerations which are always necessary to be taken into view, are most effectually presented, and, at the same time, most readily expunged from the process. In the earliest stages, where the criminative facts are few and more or less isolated they are found to occur in the greatest number ; presenting themselves in the form of suppositions of single facts, and sometimes offering a choice of several supposable facts, as explanations. But as the criminative facts increase, and as

they draw *together*, and gradually coalesce into a body, these counter suppositions, in order to possess any adverse efficacy, are required to be aggregated in a corresponding manner; taking the more elaborate form of *hypotheses* of certain states of fact; and becoming more and more difficult of construction, and maintained with more and more violence to probability, until it no longer becomes necessary to advert to or seek after them.

If the judicial investigator or juror, were the actual original investigator, and, as far as possible, the original observer of the evidentiary facts, it is probable that his conclusion, as to the guilty agency of a particular individual, would, in most cases, be made up in the same way of *gradual* development, out of gradually accumulating materials. And, indeed, in the actual mode of trial through witnesses, it is, doubtless, often the case that the minds of the jury are, in a greater or less degree, led to their verdict in a similar progressive course. (a) The theory of judicial investigation however, requires that the juror should keep his mind wholly free from impression, until *all the facts* are before him in evidence; and that he should then frame his conclusion from *all* these facts, *taken together*. (b) The difficulty attending this mode of dealing with the elements of evidence, (especially in important cases requiring protracted investigation,) is that the facts thus surveyed in a mass and at one view, are apt to confuse, distract and oppress the mind by their very number and variety, especially as they are only mentally contemplated, with little or no aid of the bodily senses. They are, moreover, necessarily mixed up with remembrances of the mere machinery of their introduction, and the contests (often close and obstinate,) attending their proof; in the course of which attempts are sometimes made to suppress or distort the truth, in the very act

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(a) *Ante*, p. 107, note (a).

(b) *Id. ibid.*

of its presentation. And the reservation of the use of infirmative hypotheses, as a *final* means of testing a presumption or conclusion provisionally formed, is attended with more or less of danger of overlooking some single hypothesis, which, though not readily suggested, might be at the same time not unreasonable in itself, and might eventually prove to be the absolute truth of the case.

On the other hand, the manner in which the facts of a case are presented before a jury on a trial, is attended with advantages peculiar to itself. In order to construct the required body of evidence out of the materials or elements which may be available for the purpose, with the nearest approach to truth, or to the actual case as it occurred, it is requisite not only that *all* the materials should be got *together*, but that they should be arranged, as far as possible, in their *proper places*, or in the relative positions which they occupied, or are reasonably supposed to have occupied, in the actual case ; it being, in fact, as already observed, a process of re-constructing and representing, with more or less of completeness and truth, the original case itself. These relative positions cannot always be effectually ascertained until all the attainable facts have been brought together, examined and compared, or adjusted temporarily (as it were) to each other, so as to develop the traces of their former actual connections ; much as an architect would proceed who was required to reconstruct a demolished edifice, out of the same materials which originally composed it, with the nearest possible approach to identity in every particular. This preliminary process is essentially performed by the public prosecutor, and the course of his proceedings in submitting its results to the jury may be briefly described as follows. His investigations having resulted in connecting, to his own satisfaction, (as sanctioned by the action of the grand jury) the two fundamental facts of a crime and a criminal, he frames out of them the compound fact or proposition that the prisoner at the bar committed the crime charged, (which is the es-

sence of the indictment as found,) and presents it formally to the jury, as the *factum probandum* of the case. Placing this in a central position, in connection with the hypothesis of guilty agency, as he has extracted it from the facts, he proceeds to present and prove in detail, the particular circumstances or indicatory facts themselves; giving to them their necessary relative positions, grouping them around the assumed central point, and in this way establishing lines or links of connection between it and them; and finally compacting and, as it were, crossing, this frame-work of evidence, by lines connecting the facts with each other; thus realizing the common but significant figure of a *net-work* of circumstances. Having done this in the view of the jury, he calls upon them to examine for themselves the body of evidence thus put together, in connexion with, and as supporting the hypothesis of guilt, as he has advanced it, and the affirmative of the issue before them: insisting, virtually if not in form, that the facts presented are the genuine facts of the case; that they are arranged in their true positions; and that, as naturally and reasonably interpreted, they point towards, and converge upon, and effectually connect themselves with the principal fact of the guilt of the prisoner, and no other: or, in other words, that they can be explained and accounted for, in no other reasonable way than upon the single supposition of the truth of that fact. The defence is made in a corresponding course, by means of exculpatory facts proved and supposed; it being insisted that the criminative facts presented are not the genuine facts of the case; that the positions assigned them are not the true ones; that the connections claimed to have been established do not exist; that, in their indications, they do not converge upon the point or fact assumed, or upon any one common point or centre, or that they may converge upon other points as well as that occupied by the principal fact in issue; in other words, that they may be explained and accounted for, on one or more hypotheses consistently with the innocence of the

accused, as reasonably as upon the affirmative hypothesis, or more so. And, in fine, these adverse hypotheses are specifically placed before the jury; thus relieving them, in most cases, from the necessary duty of seeking for them themselves.

In regard to the characteristic feature of *united* or convergent bearing, which has been mentioned, it may be further observed, that it is often, and indeed, most commonly, found to take place in two successive forms or series; the remoter and more minute circumstances converging upon certain intermediate points, constituting the leading facts of the case,—such as the existence and influence of a criminal motive, the preparation and possession of the means of crime, the possession of an opportunity to commit it, proximity to or presence at the scene of crime, and conduct after its commission;—and these again converging, in fewer numbers, but with greater force, and with the same ultimate effect, upon the central or principal fact which is the object of proof.

The figure which has, thus far, been used in illustrating the process of circumstantial proof, and which has been suggested by the meaning of the word “circumstance” itself, is that of a *frame-work* of facts, arranged in certain positions of relation to the fact sought, and connected with it and with each other by lines expressive, at once, of their separate and united significance. Another figure more frequently used as descriptive of the same process, or rather of the body of evidence constructed by it, is that of a *chain* connecting the two great and fundamental points of a case,—the crime committed, and the individual charged with its commission,—the links of such chain answering to the evidentiary facts proved. This figure expresses, with great force and aptness, the historical order of the facts, and the necessity of a continuous connection between them throughout, but it does not represent that other feature of the process, which has been prominently presented in the

present section ; namely, the aggregation of *distinct* elements, or elements drawn from distinct sources into one consistent and homogeneous body. (a) The evidence does not always present a *single line* of continuous and connected circumstances, but often exhibits lines of connection from different points in *collateral* positions. Supposing, however, a chain to be composed of a number of minor and constituent chains, (b) the figure acquires aptness in every sense. The evidentiary facts, with their inferred and assigned meanings, may also in many cases be very appropriately compared to the strands of a rope or cable, forming so many lines of connection with the principal fact, each continuous in itself, though weak in its connecting power ; but, when woven together in sufficient numbers, constituting a medium of connection which cannot be broken.

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## SECTION II.

*The subject continued, with illustrations from actual cases.*

The course of illustration adopted in the last section was without any particular reference to actual recorded cases of proof by circumstantial evidence ; the facts mentioned being merely supposed to exist, and arranged in combinations best

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(a) Mr. *Bentham* has taken some pains to expose the inaccuracy of the application of the metaphorical term "chain" to a body of circumstantial evidence. In such a body, the more numerous the constituent facts, if relevant, the greater its strength and efficacy. But "take an iron chain," he observes, "the more links you add to it the weaker you will make it, not the stronger ; and, by adding link to link, you will at last make it break by its own weight." 8 Jud. Evid. 223, 224, 225, note.

(b) See *ante*, p. 122, note.

adapted to the object in view. Some actual cases may now be introduced with advantage, as confirming the views and conclusions already presented.

*Donellan's* case has been referred to, with approval, by Mr. *Bentham*, not only for individual facts, but, to some extent, as illustrative of the process of aggregating the elements of evidence into a body of gradually increasing force. (a) It will be sufficient to carry out the views of this writer, by presenting briefly all the leading facts of the case, as bearing upon the principal fact sought. And, in so doing, we may begin at the very earliest stage, or with the *corpus delicti* itself; the proof of which rested, in a material degree, upon the same facts which tended to fix the guilt of it upon the prisoner. (b)

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(a) 3 Jud. Evid. 53, 65, 282.

(b) The trial of Captain *John Donellan* took place before Mr. Justice *Buller* at the Warwick Assizes in March, 1781, and resulted in the conviction and execution of the prisoner. The case has been made the subject of much criticism, and the correctness of the verdict has been violently assailed by some writers, and vigorously defended by others. The great ground of objection was the irregularity and incompleteness of the anatomical and medical examination of the body of the deceased, as affording evidence of a *corpus delicti*; it being contended that nothing appeared on such examination, to show that the deceased had died of poison, or in consequence of the draught which he took just before his death. And although the examining physicians expressed their opinions very confidently on this point, they were considered as balanced by the opinion of the celebrated Dr. *John Hunter*, who was examined on the trial, although he had taken no part in the previous investigation. The work commonly attributed to Mr. *Phillipps*, and entitled "The Theory of Presumptive Proof," appears to have been written chiefly with the object of impugning the conviction; but the fact that the writer suppressed all mention of several of the most forcible criminative circumstances proved on the trial, detracts very much from its authority. These last mentioned circumstances served to make up the conceded deficiency in the mere physical proof of a *corpus delicti*; and it is on this ground that the verdict has received the approval of some of the best writers on circumstantial evidence and medical jurisprudence, as well as practising physicians of great eminence. 3 Benth. Jud. Evid. 53, 65, 282. Wills, Circ. Evid. 192—196. Best on Pres. § 208. 2 Beck's Med. Jurispr. 801, 802. (10th ed.) Christison on Poisons, 685. Halford's Essays, 158.



The person for whose murder *Donellan* was tried, was his brother-in-law, Sir *Theodosius Boughton*, (a) a young man of fortune, twenty years of age, who, up to the moment of his death, had been in good health and spirits, with the exception of a trifling ailment, for which he occasionally took medicine. Mrs. *Donellan* was the sister of Sir *Theodosius*, and together with Lady *Boughton*, his mother, and *Donellan* himself, lived with him at Lawford Hall, the family mansion. On the day before the death of Sir *Theodosius*, a neighboring apothecary who had previously prepared medicines for him, sent him a mild and harmless draught, to be taken the next morning. (b) In the evening, he went out fishing, and returned apparently in usual health. (c) About six o'clock, the next morning, a servant awoke him, in order to get some straps to buckle on a net, and received them from his own hand, his health still appearing good. (d) About seven o'clock, his mother went into his room and called him, for the purpose of giving him his medicine, and he then appeared to be very well. As he was taking the medicine, he observed that it smelt and tasted very nauseous, and his mother remarked that it smelt very strongly like *bitter almonds*. In about two minutes after he had taken it, and had laid down, he appeared to struggle very much, as if to keep the medicine down, and his mother observed a rattling in his stomach and gurgling. These symptoms continued about ten minutes, after which he seemed inclined to go to sleep, and his mother left the room. In about five minutes, she returned, and, to her great surprise, found him with his eyes fixed upward, his teeth clenched, and froth running out

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(a) The report here given has been carefully abridged from the Report of the Trial by *Joseph Gurney*, London, 1781, and will be found to contain several particulars not mentioned by Mr. *Wills* in his statement of the case.

(b) *Gurney's Report*; Testimony of *Thomas Powell* and *Samuel Frost*

(c) *Id.* Testimony of Lady *Boughton*.

(d) *Id.* Testimony of *Samuel Frost*.

of each corner of his mouth ; and within half an hour after taking the draught, he died. (a)

These facts may, for a moment, be dwelt upon. That the extraordinary event which had happened was, in some way, connected with the taking of the medicine, appeared from the following considerations. It was clear that a *new* ingredient of *strange* and marked qualities, strongly affecting the senses of taste and smell, had found its way, from some quarter, into the medicine-bottle. The qualities observed both by the deceased and his mother, and which were so peculiar as to be made the subject of conversation between them, were such as the draught *had not before possessed* ; and the violent symptoms which immediately followed the taking of it, and which ended in death, very naturally suggested the idea of *poison*. Any person would have been justified in viewing the facts in this connection, at least as a source of suspicion and basis of inquiry.

The attention being thus strongly, and indeed unavoidably drawn to the contents of the medicine-bottle, the first step which would naturally occur to any right-minded person of ordinary discretion, as requisite to be taken, would be to have an instant examination made of such of the contents of the bottle as might have remained in it ; and, in order to have such examination adequately made, to send for the apothecary from whom it came ; and, until his arrival, to *preserve every thing undisturbed*. This was the course which the mother of the deceased actually took. On seeing the alarming symptoms which have been described, she ran down stairs, and directed the servant to take the first horse he could get, and go immediately for the apothecary, who resided about three miles off. (b) But these judicious measures were almost immediately frustrated by the act of *Donellan*, who may now be introduced into the narrative.

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(a) Gurney's Report; testimony of Lady Boughton.

(b) *Id. ibid.*

In less than five minutes after the servant had been sent away, *Donellan* came up to the room where the young man lay, and asked his mother what she wanted. She said she wanted to inform him what a terrible thing had happened ; that it was an unaccountable thing in the doctor to send such a medicine, for if it had been taken by a dog, it would have killed him, and that she did not think her son would live. He asked in what manner her son was taken, and she told him. He then asked where the physic-bottle was, and she showed him two draughts ; [that is, two bottles, one which had contained the medicine he had taken, and another which had been used previously.] He took up one of the bottles, and asked her if that was it. She said "Yes." He then poured some water out of the water-bottle, which was near, into the phial, shook it, and then *emptied it out* into some dirty water which was in a wash-hand basin. She immediately said, "What are you at ? you should not meddle with the bottles." Upon that, he snatched up the other bottle, and poured water into it, and shook it ; then he put his finger to it and tasted it. She again said, "What are you about ? you ought not to meddle with the bottles." Upon which he said, he did it to taste it, but he had not tasted the first bottle.(a)

This act of decided interference, on the part of *Donellan*, at a most important crisis, calling for abstinence from interference of every kind, may well be characterized as extraordinary, and such as could not reasonably be supposed to proceed from a person who was at all desirous of having the cause of the alarming and fatal appearances which had been witnessed properly inquired into. The apothecary had been sent for and might be momentarily expected ; but, before his arrival, *Donellan* takes upon himself to destroy the contents of the phials, which Lady *Boughton* was endeavoring to preserve, under a pretence of examining them. It was not

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(a) Gurney's Report; testimony of Lady *Boughton*.

only deliberate conduct, but it was persisted in, in the face of repeated remonstrance. But this was not all. On one of the servants coming into the room, *Donellan* desired her to "take away the basin, the dirty things and the bottles," and he *put the bottles into her hand*. Lady Boughton observing this, took them out of the servant's hand, set them down, and bid her let the things alone. But, shortly after, *Donellan*, taking advantage of a moment when her back was turned, *put the bottles into the servant's hand again*, and bid her take them down, and was angry that she had not done it before. They were then taken down. (a) Here was more interference, amounting to an actual contest, to have these physical evidences entirely put out of view. (b)

About nine o'clock, the apothecary arrived, and *Donellan* went with him into the room where the deceased lay. But instead of asking any questions, he asked none at all. Instead of alluding to the medicine or the bottles, they were never even mentioned. They had been taken away, and the apothecary saw nothing of them. In reply to a question asked by him, as to how the deceased died, *Donellan* merely told him, "in convulsions." (c)

This conduct on the part of *Donellan*, which, at least in its effect, comprised both the *destruction* and *suppression* of vitally important evidence, may now be still further dwelt upon. It was obviously an uncalled for act of interference, from the beginning. It was, under the circumstances, improper and culpable. It was not accidental, or merely inconsiderate, but wilful, repeated and persisted in. It was, indeed, so extraordinary and so reasonably pregnant with suspicion, that the contemplation of the construction which would naturally be put upon it seems to have alarmed his own mind. For, in the course of the morning of the same

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(a) Gurney's Report; testimony of Lady Boughton.

(b) Of all this important evidence, not a word is mentioned in the professed review of the trial, in the "Theory of Presumptive Proof."

(c) Gurney's Report; testimony of Thomas Powell.

day, he remarked to his wife, in presence of her mother, that the latter had been pleased to take notice of his washing the bottles out; and that "he did not know what he should have done, if he had not thought of saying he put the water into it, to put his finger to it, *to taste*." (a) But the falsity of this excuse, it may be remarked, was shown by the fact that *he did not taste* the first bottle which he took up, and which was pointed out to him as that which contained the draught, but rinsed out and threw away its contents without any act of the kind. (b)

But to return to the quality of the draught which had been taken by the deceased, upon which the existence or non-existence of a *corpus delicti* obviously depended, and to which the extraordinary conduct already narrated only served to attract attention more strongly than ever. Had the phials and their contents been preserved unchanged, as was intended by the mother of the deceased, and examined by the apothecary from whom they came, the quality of the strange ingredient which obviously was present in the draught would have been easily detected, and the cause of the death satisfactorily explained. But this, which would have supplied the *best* evidence in the case, had all been destroyed or put out of the way, by the act of *Donellan*. There remained, however, the impressions which had been made upon the senses of taste and smell, at the time the draught was taken. These constituted the *next best* evidence in the case, and they were accordingly resorted to with the effect which will next be described.

The deceased complained of the extremely nauseous taste and smell of the medicine, at the time he swallowed it. His mother observed the peculiar smell at the same time, which she compared to that of *bitter almonds*. (c) This led to the supposition that the strange ingredient was *laurel-water*, a

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(a) Gurney's Report; testimony of Lady Boughton.

(b) *Id. ibid.*

(c) *Id. ibid.*

known poison, having a similar odor. And this supposition was, in the further course of investigation, confirmed by the following coincidences. The apothecary who had originally compounded the draught, prepared two phials; one containing merely the harmless ingredients of which he had actually compounded it, (a) and which were all that it contained when it was sent by him to the deceased; and the other, containing the same ingredients, with the addition of laurel-water. These two were presented to the mother of the deceased, on the trial, to smell; and she testified that the phial containing only the ingredients of the genuine draught did not smell at all like the medicine which her son had taken; but the other, containing the laurel-water, had a smell very like it. (b) A physician, also, to whom the latter mixture was presented, on the trial, to smell, detected the laurel-water immediately, by that sense; and testified that he knew of no medicine that corresponded in smell with it; and that the description by a comparison to the smell of bitter almonds conveyed a proper idea of it. (c) A further coincidence was, that the symptoms which preceded the death were the same as those attending death from taking laurel-water. (d)

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(a) These were, as described by him on the trial, rhubarb and jalap, fifteen grains of each; spirits of lavender, twenty drops; nutmeg water, two drachms; two drams of simple syrup, and an ounce and a half of simple water. *Id.* testimony of *Thomas Powell*.

(b) *Gurney's Report*; testimony of *Lady Boughton*.

(c) *Id.* testimony of *Dr. Rattray*.

(d) *Id.* testimony of *Dr. Rattray*, *Mr. Wilmer* and *Dr. Parsons*. And see 2 Beck's Med. Jur. 791. The evidence mentioned in the text as derived from impressions made by a physical substance upon the sense of smell, the comparison of these impressions with the smell of another substance, and the remembrance of such impressions and comparison, has been treated by the writer of the "Theory of Presumptive Proof," as amounting to no evidence whatever. "Of all the human senses," he observes, "that of smell is the most uncertain, the most variable and fallacious." P. 36. But he had previously said, without qualification, that "the senses are ever true." P. 22. And *Dr. Beck* considers this proof by a comparison of smells as "a very satisfac-

By this course of reasoning, the preliminary conclusion or presumption is arrived at, that a noxious ingredient of some kind, possessing one of the distinctive properties of laurel-water, and resembling that poison more closely than any other known substance, had, by some means, found its way into the medicine, after it had left the apothecary's hands and before the deceased took it; and that some person had been clandestinely meddling with it, for a purpose not very difficult to conjecture. The physical objects,—the phials and their contents,—by which this presumption might have been verified, had been destroyed, as already stated. But there still remained a physical object of the highest importance, namely, the dead *body* itself; and, provided *immediate* examination were made of it, the liquid swallowed or the remains of it, might be detected in the stomach, and subjected to proper analysis. But at this point, *Donellan is again found to interpose* in the way of investigation, in a manner and with an effect which will next be described.

On the same day that Sir *Theodosius Boughton* died, *Donellan* wrote to his guardian, Sir *William Wheeler*, informing him of the event, but making no reference to its suddenness nor any of the attending circumstances. (a) To this, Sir *W. Wheeler* made a brief reply expressing regret; (b) but in the course of a few days, the rumors which began to prevail as to the manner of his ward's death, and the suspicions as to the cause of it having reached his ears, he wrote to *Donellan* a letter of some length; saying that he had been applied to, as the guardian of the deceased, to inquire into the cause of his sudden death; that report said that he was better the morning of his death, and before he took the

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tory circumstance;'' as very few of the fluids in common use possess a smell at all resembling that of bitter almonds. 2 Beck's Med. Jur. 801. It may be added that the sense of smell is frequently relied on, in the most scientific experiments, as a test of the presence of certain substances, such as arsenic. *Id.* 521.

(a) Gurney's Report, testimony of Sir *William Wheeler*.

(b) *Id. ibid.*

physic, than he had been for many weeks, and that he was taken ill and died soon after swallowing it; that the affair made "a great noise in the country," and he found he was very much blamed for not inquiring into it; that it was "reported all over the country that the deceased was *killed* either by *medicine* or by *poison*;" that "the country would never be convinced to the contrary, unless the body was opened, and they should all be very much blamed." He therefore requested that the body might be "immediately opened," and named three medical men as proper persons for that purpose. The letter concluded with dwelling on the "necessity of complying with his request," as it was "expected by the country." (a) To this letter *Donellan* replied, expressing his willingness to comply with the request, and desiring that Sir *W. Wheeler* might be present on the occasion. The latter replied in a third letter, declining to be present, but reiterating his former request in more general terms. (b) The body had, by this time, been put into a coffin and soldered up. *Donellan* then sent for a physician and a surgeon, and, on their arrival, he showed them the *last letter* which he had received from Sir *W. Wheeler*, but *did not show them the previous* and all-important one, in which the suspicions of *poison* had been mentioned and dwelt on, and the "satisfaction of the country" and the "exoneration of themselves from blame," were specified as the causes of the examination. Nor did he communicate to them, or make any allusion to its contents; but only said it was "much the same as the other." (c) The coffin having been unsoldered, the medical gentlemen proceeded to look at the body, but finding it to be extremely putrid, the surgeon expressed his opinion to the physician that the proposed inquiry could give no sort of satisfaction; and, after consulting together, as *Donellan* had told them

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(a) Gurney's Report; testimony of Sir *William Wheeler*.

(b) *Id. ibid.*

(c) *Id.* testimony of Dr. *Rattray*



that the body was to be opened merely "for the satisfaction of the family," without intimating any suspicion of poison, and as nothing was said of poison, in the *letter shown* them, they concluded that, at so late a period, it was of no use to proceed, and they accordingly did not open the body, nor even take off the shroud. (a) They both afterwards testified that, had any thing been said or intimated to them, of poison, or suspicions of poison, as the cause of the death, or in connection with it, they should have opened the body at all events. (b) Here was more suppression of evidence, on the part of *Donellan*, leading to erroneous impressions upon the medical men, and attended, so far, with the effect of preventing the inquiry which had been so urgently directed to be made.

But this was not all. On the following day, another surgeon, having heard of what had taken place, called on *Donellan* and offered to open the body himself; but the latter refused to permit it, on the ground that it would not be proper to interfere in the case. (c) On the same day, *Donellan* wrote a letter to Sir *William Wheeler*, saying that he had observed his advice "in all respects;" that four medical gentlemen had been employed and had proceeded *according to the direction of his letter*, and that their report had been *fully satisfactory*. The language of the whole letter was intended to convey the false impression that *the body had been opened*; and such was the impression actually made upon Sir *William Wheeler*. (d) On being undeceived however, the next morning, the latter again wrote to *Donellan*, urging that the examination should be made without further delay, and naming the surgeon who had already offered to make it, as a suitable person. He also sent a verbal message to the latter, requesting him to attend to

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(a) Gurney's Report; testimony of *Dr. Rattray*.

(b) *Id.* testimony of Mr. *Wilmer* and *Dr. Rattray*.

(c) *Id.* testimony of Mr. *Bucknill*.

(d) *Id.* testimony of Sir *W. Wheeler*.

the examination in company with another surgeon named. (a) By this time, arrangements had been made for the funeral of the deceased ; and the surgeon having been called away at the moment, to attend a patient in a supposed dying condition, the funeral was directed to proceed in his absence, and the body was interred *without any examination*. (b)

In the meantime, the circumstances attending the death of Sir *Theodosius Boughton* having become known to the coroner, he directed the body to be disinterred and examined ; and a medical examination was accordingly, at length, made. But by this time eleven days had elapsed since the death, and, it being in hot weather, putrefaction was found to be so far advanced, that the examination was not conducted with much minuteness. The head was not opened, nor the bowels examined, the latter process being pronounced by the examining physician impossible, under the circumstances. (c) Nothing that could be called laurel-water was found in the body ; but the operating physician remarked a very peculiar impression upon the sense of the taste,—“a kind of biting acrimony upon the tongue,” resembling exactly the sensations he had always experienced from breathing over laurel-water. (d)

At the taking of the coroner's inquest, Lady *Boughton* was examined as a witness, *Donellan* also being present. When she came to mention the circumstance of his washing or rinsing the bottles, one of the jurors observed him “catch her by the gown and give her a twitch,” as though to prevent the mention of it. (e) After she returned home, he said to his wife, before her, that she had no occasion to have told the circumstances of his washing the bottles ; that she was only to answer such questions as were put to her, and

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(a) Gurney's Report; testimony of Mr. *Bucknill*.

(b) *Id. ibid.*

(c) *Id.* testimony of Dr. *Rattray*.

(d) *Id. ibid.*

(e) *Id.* testimony of *William Crofts*.

that question had not been asked her. (a) Here was another act, on his part, of attempted *suppression* of evidence.

The alleged insufficiency of the medical examination of the body, in this case, has already been alluded to, (b) as a principal ground of objection to the correctness of the conviction which followed. Admitting that the examination was not made with the scientific fullness and precision of later times, (c) this circumstance appears to have been owing, in a material degree, to the state of the body itself, at the time. This state had been brought about in consequence of the delays interposed by *Donellan* himself: and to allow it to operate in his favor, as an argument that no *corpus delicti* had been shown, would not be very far from allowing a man to take advantage of his own wrong. He who had deliberately “spoiled” the *best* evidence in the case, could not reasonably complain that the *next best* evidence at command had been resorted to. (d) If he had not, at the outset, destroyed the contents of the phials, the cause of the death might have been discovered even before the death itself took place. If he had not withheld from the physicians the first letter of Sir *William Wheeler*, or if he had but intimated any suspicion of poison in the case, the body would have been examined some days before, under more favorable circumstances.

Thus, we come, at length, to connect the person of *Donellan* directly with the death which had happened, in the character of at least, a *suspected party*,—a party who knew what its cause actually was, but who had determined to conceal that fact from all others. His whole course, from the beginning, was one of continued interference in the way of investigation ;—first, destroying the contents of the phials,

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(a) Gurney's Report; testimony of Lady Boughton.

(b) *Ante*, p 608, note (b).

(c) See Best on Pres. § 208. Wills, *Circ. Evid.* 196.

(d) See Best on Pres. chap. 7, § 145, *et seq.* and the maxim, *Omnia præsuntur contra spoliatores*, as there treated.

and then endeavoring to suppress even the mention of such conduct; first, withholding from the physicians the letter which would have led to the opening of the body, and then producing upon the writer of that letter the impression that his directions had been observed and that the body had been opened. It was not a *single act*, which might be explained on the ground of accident or thoughtlessness; but a *series* of acts, some of them persisted in, in the face of *opposition*, and all of them taken together, showing, upon every reasonable principle of interpretation, an *intention* to produce the result which actually took place. The suspicion against *Donellan* may now, in fine, be stated in the positive shape which the facts, thus far, appear to indicate; namely, that *he was the person* who introduced the laurel-water, or other noxious ingredient, into the medicine which the deceased had taken and which caused his death.

But, in order to raise this suspicion to the grade and force of a reasonable presumption of guilty agency, three leading facts must be made to appear; first, that he had the *means*,—the laurel-water itself; next, that he had an *opportunity* to infuse it into the medicine; and, lastly, that there was a criminal *motive* by which he might have been induced to the act.

That he had the *means*, was indicated by the following circumstances. Laurel-water was made by distilling the leaves of the laurel plant, (a) and a person contemplating a criminal use of it, would be more likely to prepare it himself than to obtain it from others, as the desired secrecy would thereby be better insured. Now, *Donellan* had a still, (b) and knew how to use it. He practised distillation, and that frequently; (c) sometimes openly, by distilling roses and lavender, (d) sometimes privately, in a locked room. (e)

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(a) *Id.* Gurney's Report; testimony of Dr. Rattray.

(b) *Id.* testimony of *Mary Lynnes*.

(c) *Id.* *ibid.*

(d) *Id.* *ibid.* and testimony of *Francis Amos*.

(e) *Id.* testimony of *Mary Lynnes*.

Laurel grew in the garden, and was always within reach. (a) It was clear, therefore, that he had the means of preparing the poison. (b)

That he had an *opportunity* of infusing it into the medicine of the deceased, may appear from the following circumstances. He resided in the same house with him, which necessarily brought them together, but this was not enough for the purpose. The deceased had been in the habit of keeping his medicine in his dressing-room, and as long as this was continued, few or no opportunities of access to it could be had. He complained, on one occasion, when *Donellan* was present, of forgetting to take his medicine. "Why don't you," said the latter, "set it in your *outer room*? then you would not so soon forget it." The deceased made the suggested change, which had the effect of presenting an opportunity not before existing. (c) Here was not only an opportunity, but one brought about by *Donellan's* own contrivance. It was moreover known in the family that the deceased had received his medicine, and that he was to take it the next day. (d).

The existence of a *motive* to commit the crime indicated, appeared from the following fact. The deceased, upon coming of age, would have been entitled to a fortune of above two thousand pounds a year, which, in the event of his dying before that period, would go to his sister, *Donellan's* wife. *Donellan* was therefore interested in having his

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(a) Gurney's Report; testimony of *Francis Amos*. All these important facts are omitted in the statement of the case in the "Theory of Presumptive Proof."

(b) A remarkable circumstance, still more proximate than any of those stated in the text, and mentioned by Dr. *Beck* as having been discovered in the case, though not proved on the trial, went to show that *Donellan* had actually been employed in distilling *laurel-water*. A single number of the *Philosophical Transactions* was found in his library; and of this single number the leaves had been cut only in *one place*: and that place happened to contain an account of the mode of making *laurel-water* by *distillation*. 2 *Beck's Med. Jur.* 802.

(c) Gurney's Report; testimony of *Lady Boughton*. 3 *Benth. Jud. Evid.* 66.

(d) Gurney's Report, *ubi supra*.

death take place before the time indicated. This time was approaching, as the deceased was already twenty years old. It was further shown that the parties did not, in general, live in friendship and intimacy. (a)

The proof of these three leading precedent circumstances of motive, means and opportunity, while supplying the necessary conditions of a definite presumption of guilt, strengthens, in a very material degree, the force of the concomitant and subsequent circumstances of the destruction and suppression of evidence which have been previously mentioned, and acquires, in turn, from those circumstances, additional prominence and efficacy. The possession of the particular kind of means indicated throws light on the *corpus delicti* itself, while all the circumstances taken together point, without the least inconsistency, to *Donellan* as the particular agent from whose interference with the medical draught, the *corpus delicti* originated.

But, in addition to these, there appeared in the case a variety of *minor* circumstances of conduct, on the part of the accused, beginning at a period considerably anterior to the death of his brother-in-law, and continued after that event, which support the hypothesis of his criminal agency with singular consistency, and serve to compact and complete the whole body of the proof. These will now be mentioned.

For some time before the deceased died, *Donellan* expressed to his mother his apprehension that *something would happen to him*, and that before long; that he was in a very bad state of health. (b) On the Saturday previous to his death, in a conversation with a clergyman who was well acquainted with the family, he dwelt on the same subject, and made such a representation of the state of his body and even of his mind, that the clergyman observed that if these statements were true, he did not think his life worth two years'

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(a) Gurney's Report; testimony of Lady Boughton.

(b) *Id. ibid.*

purchase ; to which *Donellan* replied, "Not one." (a) All this time, however, the deceased was in good spirits, and looked well, and there was nothing in his appearance to favor the opinion which *Donellan* had expressed. (b) These circumstances belong to the class of *intimations* (already considered) (c) of the probable occurrence of an event which a criminally disposed person has determined to bring about ; and which are intended, by taking from the event any character of singularity or suddenness it might otherwise possess, to prepare the mind for it and induce it to be passed over as an ordinary and natural occurrence.

About six o'clock in the afternoon of the day before he died, Sir *Theodosius Boughton* went out fishing, attended by a servant, and returned a little after nine, apparently in health. (d) During his absence, *Donellan* told his mother that he had been to see them fish, and that he would have persuaded Sir *T.* to come in, lest he should *take cold*, but he could not. (e) The next morning, when Sir *T.* was dead or nearly so, and while the things were being removed, to be put into the inner room, *Donellan* said to the servant, "Here, take his stockings, they have been *wet*; he has caught cold to be sure, and that might occasion his death." Upon this, his mother examined the stockings, and there was *no mark* or appearance of their having been wet. (f) It further appeared that it was impossible for him to have wet his feet on the occasion mentioned, as he had boots on, and remained on horseback all the time the fishing was going on. (g) And it moreover, appeared, that *Donellan* was *not with him* that evening, any part of the time. (h) Here

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(a) Gurney's Report; testimony of Rev. Mr. *Newsam*.

(b) *Id. ibid.*

(c) *Ante*, p. 831.

(d) Gurney's Report; testimony of *Samuel Frost* and Lady *Boughton*.

(e) *Id. ibid.*

(f) *Id. ibid.*

(g) *Id.* testimony of *Samuel Frost*.

(h) *Id. ibid.*

were false statements, apparently intended to aid the effect of the intimations and apprehensions last mentioned, by accounting for the death as occasioned by natural and sufficient causes.

After Sir *T. Boughton* was dead, *Donellan* accounted for the event in various ways. About a quarter of an hour after it happened, he told one of the servants that it was in consequence of his having been out so late fishing. (a) The day the body was opened, he told the same person that the death was occasioned by the bursting of a blood vessel. (b) To others he gave other accounts. (c) After his arrest, he attributed it to poison. (d)

Another circumstance of conduct on the part of *Donellan* after the death of his brother-in-law, went to show that he had contemplated the possibility of the event with satisfaction, and that he was, in reality, satisfied and pleased with its occurrence; thus serving to indicate the actual influence and operation of the criminal motive already assigned. On the night of that day, *Donellan* went into the garden and said to the gardener, "Now, gardener, you shall live at your ease, and work at your ease; it shall not be as it was in Sir *The's* days. I wanted before to be master, but I have got master now, and shall be master." (e)

It has already been mentioned that *Donellan* had a still, and practiced distillation. After Sir *Theodosius Boughton's* death, this practice was discontinued. One day, *Donellan* brought a still to the gardener to clean; it was full of lime and the lime was wet. (f) Wet lime was a substance well adapted to remove from the still any vestiges of its use which it might have contained. Supposing it had been used to distil laurel-water, the lime furnished an effectual means

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(a) Gurney's Report; testimony of *Catharine Amos*.

(b) *Id. ibid.*

(c) *Id.* testimony of *Francis Amos*.

(d) *Id.* testimony of *John Darbyshire*. See *ante*, p. 460.

(e) *Id.* testimony of *Francis Amos*.

(f) *Id. ibid.*



of destroying all traces of that liquid which might have been discoverable by the senses: thus constituting another fact of destruction of evidence in the case. As it was, *Donellan* felt himself called upon to explain the circumstance, which he did by telling the gardener, but without being questioned on the subject, that he had used the lime to kill fleas. (a) Shortly after this, he took the still to the cook, and desired her to put it into the oven, to dry it, that it might not rust. (b)

Mention has been made, on a former page, (c) of the use of the more minute circumstances of a case, to indicate the existence of some leading fact, from which, in connection with other leading facts, the truth of the principal fact is to be inferred; there being, in such cases, a convergence upon *intermediate* points, prior to the final convergence upon the principal or central fact itself; involving a succession of inferences corresponding with the position of the facts. The following recorded cases may be mentioned as illustrations.

On a trial for murder in Virginia, it appeared that a dirk without a cap to the handle, had been found secreted near the place of the murder. It was important to show that this dirk belonged to the prisoner, as leading to the inference that he was at or near the scene of the crime; and, with this view, the following minute circumstances, being also of a remote character, in point of time and place, were introduced in evidence. The handle of the dirk found was engraved with the letters "J. H." and the cap of a dirk, engraved "J. H." was handed to a witness by a negro a mile and a half from the place; but how he came by it, no one could tell. It appeared that some sixteen or seventeen years before, a witness purchased a dirk, with this engraving, for *James Hickman*, the half-brother of the pris-

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(a) Gurney's Report; testimony of *Francis Amos*.

(b) *Id.* testimony of *Catharine Amos*.

(c) *Ante*, p. 601.

oner ; that *Hickman* since died : and that the prisoner had admitted that a dirk was the only part of *Hickman's* property he had received. The witness who heard him make this admission, saw a dirk in his hand, with "J. H." engraved on the handle, but could no further identify it with the one produced. The dirk found secreted was identified by the finder, from its general appearance, with the one produced ; and the cap produced by the negro apparently fitted the handle. The prisoner had, before the murder, lent a dirk, not identified, which was returned to him before the murder was committed. There was no other proof that the prisoner had ever been at or near the place of the murder. These circumstances were allowed to go the jury, as evidence that the dirk found belonged to the prisoner ; and they were told that, if they had no doubt of its being his property, then the prisoner's dirk, so found, made one circumstance to be weighed with others. And this was holden well, on error. (a)

The Rhode Island case of *The State v. Avery* (b) may be selected as an illustration of the use of distinct combinations of minor facts or circumstances, arranged in the stricter form of *chains* of evidence, (c) to prove distinct leading facts from which the final inference of guilty agency is to be drawn.

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(a) *Mendum v. The Commonwealth*, 6 Randolph, 704, 711—713. It is remarked upon this case, that "it is obvious how perfectly slight and utterly inconclusive any one, or any two, or three of these circumstances must have been. Yet, *all being combined*, the result of the trial (a verdict of guilty,) shows that the jury felt safe in acting upon them, as leaving no doubt." 3 Phill. Evid. (Cowen & Hill's notes, Van Cott's ed.) Note 307, pp. 597, 598; citing *The State v. Watkins*, 9 Conn. R. 52, 53.

(b) Tried before the Supreme Court of Rhode Island, May, 1833. In this case, the prisoner was acquitted. But the evidence produced is not thereby deprived of its pertinency as an example of the method of proof mentioned in the text.

(c) These also furnish illustrations of the nature and use of minor or constituent chains of circumstances, composing a body of evidence. See *ante*, p. 602.

On the afternoon of the 20th of December, 1832, *Sarah M. Cornell*, the deceased, who worked in one of the factories in Fall River, Massachusetts, and boarded with a resident of that place, left her boarding place at half-past five o'clock, to fulfil an *appointment* of which she had spoken some days before, and respecting which she appeared to feel considerable uneasiness. She went out in something better than her ordinary dress, saying that she was going to *Joseph Durfee's*, and should, perhaps, return immediately, but that, if she did not, she would be home by nine o'clock. (a) She did not return that night, and the next morning was found dead, hanging by the neck to a stake in a stack-yard on the premises of *John Durfee*, a resident of Tiverton, Rhode-Island, whose house was half a mile from the bridge at Fall River. (b) The arrangement of her dress as she was found and certain striking marks of apparent violence on her person, led to the belief that she had been murdered; and a memorandum in her hand-writing, found in her band-box after her death, having concurred, with other circumstances, in attaching suspicion to the accused, who was a Methodist minister, residing at Bristol, R. I., he was subsequently arrested and brought to trial.

Two of the leading facts proposed for proof, on the part of the prosecution were,—first, that, on the very evening on which the deceased went out to fulfil the appointment of which she had spoken, she was, by previous appointment, *to have met the prisoner*; and, next, that *he actually did meet* her that evening, at or near the place where she was found dead.

In support of the first of these facts, the following chain of circumstances was claimed to be proved. Upon an examination made of the effects of the deceased, on the same day on which her body was found, three opened letters ad-

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(a) Report of the trial; testimony of *Harriet* and *Lucy Hathaway*.

(b) *Id.* testimony of *John Durfee*, and others.

dressed to her, were found in her trunk ; one written on pink-colored paper, one on yellow, and one on white. (a) The same letters had been seen in her possession about a week before her death, (b). The letter on pink paper was dated Providence, November 1831, signed with the initials "B. H." and directed to the deceased, at Fall River, "to be left at Mr. *Cole's*." It contained a proposition for a clandestine meeting, to the following effect. It first suggested that she should come to Bristol, on the 18th of December, and wait till evening, and then go out to a place mentioned where the writer would meet her ; and requesting her, should it storm on the 18th, to come the 20th. If she could not come, and it would be more convenient to have the meeting at a place mentioned in Somerset, on either of the above evenings, the writer would meet her there at the same time. If she could not do either, the writer would come to Fall River, on one of the above evenings, when there would be the least passing. The letter concluded with requesting her to write soon, and tell which ; and desired her to direct her letters to "*Betsey Hills*, Bristol." (c) It afterwards appeared that a person of this name was a niece of the prisoner's wife, and had resided some time in his family. (d)

This letter was claimed to be traced from the deceased to the prisoner, by the following chain of testimony. The engineer of a steamboat running from Fall River to Providence, testified that, one morning in November, while the boat was lying at the wharf in Providence, a person, whom he identified as the prisoner, came on board and asked him if he would take a letter for him to Fall River. The engineer told him he could put it into the letter-box, but he said he did not want it to go so. He wished it delivered as soon as the boat got in. The engineer told him he did not carry

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(a) Report of the trial; testimony of *John Durfee*.

(b) *Id.* testimony of *Harriet* and *Lucy Hathaway*.

(c) Report of the trial, p. 50, (Providence ed.)

(d) *Id.* testimony of *Betsey E. Hills*.

letters himself, and that the hands were not allowed to carry any; but on the person's observing that it would do him a great favor, if he would carry it, he took it, with twelve and a half cents which the person gave him with it. He identified the letter by its direction and the color of the paper, and certain marks which his own hands had left on it: and further testified that, on reaching Fall River, he gave it to Mr. *Cole* of that place, according to its direction. (a) Mr. *Cole* testified that in November, while the deceased was boarding at his house, he received from the last witness a letter directed to her, which he desired his daughter to take to the deceased. (b) And his daughter testified that she took it to her, and saw it in her possession afterwards. (c)

It will be seen that, in this letter, the deceased was requested to write and say which of the three proposed places of meeting she would approve. To show that she did write, it was proved by the post-master at Fall River, that, on the 19th of November, a letter was mailed for Bristol directed to the prisoner. (d) And it was proved by the post-master at Bristol, that, on the 19th November, a letter was received from Fall River; and that, on the same day, a charge of postage was made against the prisoner, which he afterwards paid. (e)

The next letter in the series was on white paper, without signature, in the following words: "Fall River, Dec. 8. I will be here on the 20th, if pleasant, at the place mentioned at six o'clock; if not pleasant, the next Monday eve.—say nothing." (f) This letter was claimed to be traced to the prisoner by the following chain of circumstances.

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(a) Report of the Trial; (Providence ed.) testimony of *John Orswell*. See also the New York Report, (Stodart's ed.)

(b) Report of the Trial; testimony of *Elijah Cole*.

(c) *Id.* testimony of *Betsey E. Cole*.

(d) *Id.* testimony of *Seth Darling*.

(e) *Id.* testimony of *Lemuel Briggs* and *Walter D. Briggs*.

(f) Report, p. 50, (Providence ed.)

On the 8th December, the date of the letter, the prisoner was at Fall River. Between nine and ten o'clock in the morning of that day, he went into a store in Fall River, and asked for some letter-paper. (a) He went behind the counter to the place where the paper was kept, and was seen by the store-keeper at the desk, (b) and by another person, with a pen in his hand, (c) but was not actually seen writing. Shortly after, he asked for a wafer, but the store-keeper, not having any, got one for him at the next door. (d)

The person who gave the store-keeper the wafer, testified that it was not of a common color; it was brick-color; and on being shown the letter of the 8th December, said that the wafer on it looked like the wafer she gave. (e)

The person who was clerk in the post-office at Fall River, in December, testified that, one day, between nine and ten o'clock in the forenoon, a person, whom he believed to be the prisoner, dropped a letter into the box, directed to the deceased, and marked with one cent postage, which he afterwards delivered to the deceased. (f)

The letter itself was written on a half sheet of letter-paper. Among the paper which was in the store where the prisoner called for paper, on the 8th December, a half sheet of letter-paper was found in the middle of a half-ream. (g) This being compared with the letter, the edges of the two pieces were found to correspond. (h) And on examining the pieces with a magnifying-glass, this correspondence of the

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(a) Report of the trial; testimony of *Iram Smith*.

(b) *Id. ibid.*

(c) *Id.* testimony of *Jeremiah Howland* According to another report, this witness saw the prisoner with a piece of writing paper in his hand. New York Report, Stodart's ed.

(d) Report of the trial; testimony of *Iram Smith* and *Content Parry*.

(e) *Id.* testimony of *Content Parry*.

(f) *Id.* testimony of *Rufus H. Lushure*.

(g) *Id.* testimony of *Iram Smith*.

(h) *Id. ibid.*

edges was verified in the minutest particulars. (a) The water-mark on the letter, also corresponded with that on the other sheets of paper. (b)

The second of the two leading facts proposed for proof in the same case was, that the prisoner actually met the deceased, at the time appointed, (the 20th December, about six o'clock, P. M.) and near where her body was found ; or, at least, was in the immediate vicinity of the place, on the evening of her death. This was claimed to be made out by the following chain of testimony.

It was proved and not denied, that the prisoner left his residence in Bristol, in the afternoon of the 20th December, and crossed the ferry from that place to Portsmouth ; that he was seen at Portsmouth immediately after, and that he returned there about ten o'clock at night. To show that, during this interval, he actually went to the vicinity of the supposed murder, the following facts were presented in evidence, tracing his movements from one point to another, successively, both there and back.

The ferry-man testified that he ferried the prisoner over, about two o'clock, in the afternoon, that he was the only passenger who crossed at the time, and that he paid double ferriage for being taken over, in that way. (c) He was dressed at the time in a brownish colored surtout, (d) and was observed to have the same on, when he returned to the ferry at night, and also a large black hat, with a wide brim. (e)

The prisoner having been seen to land at Portsmouth, a little after two o'clock, a resident of that place testified that, on the afternoon of the 20th December, he saw a strange man above the common height, and dressed in dark clothes and hat, going past his house, first in a direction towards the south,

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(a) Report of the trial; testimony of *Harvey Harnden*.

(b) *Id. ibid.*

(c) *Id.* testimony of *William Pearce, jun.*

(d) *Id. ibid.*

(e) *Id.* testimony of *Jeremiah Gifford*.

and afterwards towards the east (*a*) which was the proper direction to be taken by a person going to Fall River. (*b*)

Two other residents of Portsmouth testified that, on the same afternoon, about half past two o'clock, as they were returning from Fall River market, after crossing the Stone Bridge, they met a tall man walking fast, in dark colored clothes and broad-brimmed hat, with a handkerchief, tied like a cravat over the chin, who passed on, without looking at them. (*c*)

The keeper of the Howland-ferry toll-gate, (commonly called the Stone Bridge,) testified that, about three o'clock on the same day, a man about six feet high, wearing dark colored clothes, a surtout and black hat, and "looking like a lawyer, doctor, or minister," came up and observed that it was a cold blustering day. The keeper invited him into the house, but he declined, saying he was going to Fall River, paid his fare and walked on. He identified the prisoner as the man. (*d*)

The keeper of the Bridge Tavern, at Tiverton, on the east side of the Stone Bridge, testified that about three o'clock, the same day, he observed a man about six feet high, dressed in dark clothes, a surtout coat and broad brimmed hat, coming from the bridge on foot, at a very fast walk. He noticed him particularly, and observed that he exactly resembled the prisoner. (*e*)

Another witness, residing at Tiverton, just to the north of the Stone Bridge, testified to the same fact, saying that she thought, from his dress, that the person was a Methodist minister, and that he walked so very fast as to draw from her a particular remark. (*f*)

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(*a*) Report of the trial; testimony of *William Anthony*.

(*b*) *Id.* testimony of *Jeremiah Gifford* and others.

(*c*) *Id.* testimony of *William Carr* and *Charles Carr*.

(*d*) *Id.* testimony of *Peleg Cranston*.

(*e*) *Id.* testimony of *George Lawton*.

(*f*) *Id.* testimony of *Annis Norton*. For the defence, evidence was given



The next link in the chain brings the individual who has been the subject of the preceding testimony, quite to the scene of the supposed crime.

About sunset, or a little before, on the same twentieth day of December, the person in whose stack-yard the deceased was found dead the next morning, when about twenty rods from the stack-yard, saw a man, about eighty rods from him, standing and looking about. He was a tall man, in a dark colored surtout, and a black hat with larger brim and higher crown than common. His attention was directed towards this man, by the blasting of a rock in the vicinity, which exploded at the time. The man was looking towards the west, and could see the whole village of Fall River from where he stood. The stack could be seen from the village. He could not see the man's face, as his back was towards him. He did not see the man move, but went about his business; and soon after he heard another explosion louder than the first. (a)

The person who was engaged in blasting the rock on this occasion, testified that, after having fired one charge, he charged the rock a second time, with a larger quantity of powder, and after he had applied the fire, as he was running westward to avoid the danger of the explosion, he saw a man sitting on a wall, about twenty rods from him, with his face to the north-east, who got off the wall, when he saw him, and walked leisurely towards the north. Seeing that the man was going towards the rock, he called out to him to look out. The stranger turned his head, looked up and stopped, and just then the rock exploded; after which he walked off to the eastward. When nearest, he was ten rods from the witness, who took particular notice of him, the light being still pretty good, although he had not a full view of his face. The stranger was of the same tall stature

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to show that the prisoner, after landing at Portsmouth, went in a direction quite different from that here indicated.

(a) Report of the trial; testimony of *John Durfee*.

and dressed in the same dark surtout and broad-brimmed hat which have been described. The witness thought the prisoner to be the same man. (a)

There was further testimony given on the part of the prosecution, intended to trace the movements of the same individual back from Fall River to Bristol Ferry, after dark ; but it was not very definite and was opposed by counter evidence. Enough, however, has been stated to serve the general purpose contemplated under the present head.

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### SECTION III.

#### *Recapitulation of processes involved in the application of Circumstantial Evidence.*

From the foregoing description of the process of circumstantial proof, especially that of the presumptive kind, it will be seen that it is, throughout all its stages, a process of *interpreting* facts, as means of arriving at the knowledge of a desired truth. As incident to this, it is also a process of *accounting for* and explaining their existence, and of investigating their *causes* ; physical phenomena being traced to and connected with human agency, and facts of human conduct being traced to those inner sources from which they derive their criminal quality, and from which, though inaccessible to the sense, they are known from observation, to arise. (b)

In all this, the elementary process of *comparison* is largely

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(a) Report of the trial; testimony of *Abner Davis*. See also, the testimony of *Benjamin Manchester*. The New York pamphlet report has been followed in some particulars.

(b) See *ante*, pp. 82, 88, 151.

and necessarily called into exercise. A single evidentiary fact is compared with the principal fact sought, in order to ascertain its relation and bearing. Several evidentiary facts are compared with each other, in order to arrive more readily at their individual and united meaning, and, at the same time, to ascertain whether they are susceptible of actual connection, as elements of one and the same transaction. And throughout this, again, there is a constant reference to, and comparison with the great standard of all judgment,—the *natural and ordinary course of things*, as established by observation and experience. (a)

As a practical and necessary consequence of these processes, the process of circumstantial proof is one of actual *connection* and *combination*; an aggregation of various and distinct elements into a consistent and homogeneous body, representing, as nearly as possible, the transaction which is the subject of inquiry; and an aggregation of the various presumptions or inferences separately deducible from each fact, into one general and final presumption of the truth of the principal fact sought. (b) Throughout this process, also, there is the same constant reference to the great standard of experience and observation. Because certain facts have been usually, if not uniformly, found to be associated in actual observed cases, it is inferred that they were so associated in the particular case in question. And because, as thus associated, they have been further found to be connected with the principal fact sought, and have been actually employed with success in developing and proving it, they are, by analogy, admitted to the same connection, and employed in the same capacity, in the particular case. (c) And lastly, in order to give the final presumption arrived at, its requisite quality of moral certainty, the facts on which it rests are compared with as many opposite or rival hypotheses as can

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(a) See *ante*, pp. 81, 149, 151.

(b) See *ante*, pp. 152, 176.

(c) See *ante*, pp. 81, 150.

reasonably be raised, to see whether they cannot be explained consistently with one or more of such hypotheses. (a)

The process of circumstantial proof is, in short, an application, under various modifications, of the process of *natural presumption* as founded upon *probable reasoning*, the character and details of which have already been sufficiently explained.

There is one point of view, however, in which the process of proving the truth of criminal charges by circumstances, remains to be more particularly considered; namely, that of *identification*, as applied both to persons and to things. This will form the subject of the next section.

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#### SECTION IV.

##### *The process of Identification particularly considered.*

The process of *identification* is one which is constantly and necessarily called into exercise in the application of judicial evidence of every kind. Every subject which is formally proposed for the action of the law must first be individualized; that is, it must be singled out and separated from all others, distinctly and specifically presented by name or description before the tribunal, and actually proved to be the subject it is represented to be, and no other. Until this is done, there is no proper subject for the action of the tribunal in any case.

The proof of the signature of a common promissory note furnishes a familiar illustration of what has just been said. The note is presented as a specified written promise of the particular person against whom the remedy is sought; the

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(a) See *ante*, p. 181. *at seq.*

proof of the signature is the identification of it to be his particular promise as described : and, through this proof, the party himself, (whom the signature represents,) is finally and effectually *identified* as the particular subject for the action of the remedy. So, in criminal cases, the prisoner who is arraigned for trial, under a particular name, as the perpetrator of a crime specified, must be satisfactorily *identified* as such person and perpetrator, before he can be subjected to the penalty which the law has provided, and which the prosecutor demands to be applied in the case.

But it is not only in reference to the *ultimate* subjects of legal action, that this process of identification is necessarily called into exercise. The whole apparatus of *means* by which this action is arrived at and applied, or, in other words, the particular materials of the evidence employed for the purpose, especially such as consist of objects of sense, are subject to the same rule, and cannot be effectually used in their instrumental capacity, without being first *identified*, or proved to be what they are alleged to be. A knife, pistol or hatchet, alleged to have been found at or near the spot where a murder is charged to have been committed, and produced in court on the trial, as a means of establishing a *corpus delicti*, must be proved or identified as the same article which was so found. And if it is further sought to be used against the prisoner, as a means of connecting him with the offence, it must be further proved or identified as having belonged to him, as having been in his possession at or about the time the crime is supposed to have been committed. Indeed, without the precision of impression and statement which identification implies and involves, neither the witness who testifies, nor the tribunal which hears him, can have any clear ideas of the subject presented for consideration ; and, of course, the latter can have no basis for the inferences of judgment which are required to be drawn, and no certainty in regard to the inferences themselves. In

short, without identification of some kind or in some degree, evidence of any sort, natural as well as judicial, is deprived of its whole distinctive quality and function, as a means of making clear the truth of the matter to which it is applied. (a)

The subjects of identification in criminal cases may be classed under the two general heads of *persons* and *things*. And, in regard to both of these subjects, the process of identification is of two descriptions; *positive* identification, where the testimony is given rather in the shape of knowledge than belief; the witness speaking from the impression made directly upon his mind by the general appearance of the subject, without reference to particulars, or to the precise reason why he knows it to be the same, and which involves no particular process of reasoning or inference; and identification *from circumstances*, where the witness bases his belief upon certain observed qualities or appearances of the person or thing in question, and deduces it from them by a process of reasoning. Hence, the particular form of his impression, even when most complete, is not so much that the person or thing is the same, as that it *must be* the same. It is the latter description of identification, only, which properly falls within the design of the present work; the former belonging to the subject of direct evidence. A remark or two, however, in reference to positive identification will not be altogether out of place.

It often happens that the most positive and satisfactory impressions of identity which the mind receives from external objects, are those for which no particular cause can be assigned; the impression being made at once, by the joint effect of a multitude of minute characteristics which it is impossible to enumerate or describe. The recognition or identification of a child by its parent, or *vice versâ*, or of

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(a) See *ante*, p. 1.

any one near relative by another, is of this description. This, of course, rests upon intimate knowledge of the subject; and it is according to the degree of this knowledge that the value of the evidence is always to be estimated. An observer is more apt to be deceived in his impression of the identity of a person whom he but slightly knows, than in that of an intimate acquaintance; and when he has only seen the person once, his impression is still more liable to error. (*a*)

The case is often the same in regard to inanimate things, as subjects of identification. A person becomes impressed with the identity of an article of property which he has long possessed, and seen and handled daily, (such as an article of his own dress,) not from any particular marks or signs upon or about it, but, absolutely, from its general appearance or *tout ensemble*. In such a case, he will often find himself unable to assign a reason for his knowledge, if such should be required of him; or, if he undertakes to do so, he may assign what seems to be a very absurd one. (*b*)

Perhaps the best illustration of this species of positive identification, is furnished by the proof of handwriting, which is nothing more than the *identification* of the writing shown to the witness, as that of the person by whom it is alleged and claimed to have been written. The most positive impression of identity, in these cases, constituting the most reliable evidence possible, is that which is derived not from particular marks, or indicatory appearances,—not from the shape of one or more particular letters, or the particular mode of connecting them, (for it is notorious that no two genuine signatures are exactly and mathematically alike, in all their minutiae,)—but from the appearance of the whole *taken together*.

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(*a*) See the observations of Rolfe, B. in charging the jury in the case of *Regina v. Rush*, Burke's Trials, connected with the Upper Classes, 509, 510.

(*b*) See 2 Evans' Pothier on Obligations, 218. (Phil. ed. 1853.)

The subject of identification by circumstances, will now be more particularly considered under the two general heads which have already been mentioned; namely, *persons* and *things*.

### I. *Identification of Persons.*

The two leading descriptions of persons which most frequently become the subjects of identification, in the course of judicial inquiry into crimes, are, first, the person of the *subject* of the crime, and, secondly, the person of the author or *perpetrator* of it.

1. Identification of the person of the *subject* of the crime. This is one of the earliest processes which becomes necessary in cases of homicide and supposed murder, and forms an essential part of the proof of a *corpus delicti*. It will be considered hereafter, in connection with that particular subject.

2. Identification of the person of the *criminal*.

The circumstances which go to identify an accused party as connected with a crime charged, are of two principal kinds, first, those of a remoter and more minute character, the inferences from which are only approximations to identification, and which chiefly serve to narrow the range of persons within which the particular criminal agent is to be sought; their principal use being to introduce and aid the proof by more proximate circumstances: and, secondly, circumstances which more directly connect the accused individual with the transaction, and which, in their effect, often amount to positive identification.

(1.) Under the first of these divisions, the following circumstances may be mentioned.

The direction and appearance of wounds upon the body of a murdered person, especially such as have been inflicted with fire-arms, often serve to indicate the distance at which the murderer stood, and the position which he occupied



while inflicting them, and thus have an effect to confirm an hypothesis based upon other facts and inferences. In the Mississippi case of *The State v. McCann*, (a) there were several minute physical circumstances shown in evidence, from which important conclusions were drawn as to the person of the murderer. The deceased, while riding home one evening, had been shot in the back of the neck. The surface and edges of the wound, as it appeared when the body was first discovered, together with a straw hat which the deceased wore at the time, were found to be blackened with smoke and powder; (b) showing that the shot had been fired from a weapon held in close contact with the person, and most probably from a pistol. (c) A saddle was found on the ground, not far from the body, with blood upon the right stirrup-leather, (d) going to show that the deceased was shot upon his horse. (e) An impression was discovered to have been made, by a ball, upon a tree near the spot, some six feet from the ground, on the side next the road; and the ball itself was found at the foot of the tree, bruised and flattened; (f) indicating that the person who fired the shot was also on horseback, and elevated somewhat above the deceased. (g) The same circumstances went to show that the shot did not proceed from a person concealed in the woods. (h) The conclusion from these circumstances was, that the pistol was fired by some person *on horseback*, in the road, and riding *higher* than the deceased; (i) and this conclusion corresponded with other facts which were actually proved; namely, that the prisoner was seen on horseback, the same evening, on the same road where the deceased was last seen alive; and that the latter

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(a) 18 Smedes & Marshall, 472, 473.

(b) *Id.* 474, 477, 478, 479.

(c) *Id.* 490, Clayton, J.

(d) *Id.* 474.

(e) *Id.* 490, Clayton, J.

(f) *Id.* 477, 479.

(g) *Id.* 490, Clayton, J.

(h) *Id.* *ibid.*

(i) *Id.* *ibid.*

rode a small horse, and, from age, stooped forward as he rode. (a)

The position and direction of wounds also frequently serve to establish the fact that the person who inflicted them was left-handed; and thus furnish a most important coincidence in cases where it is proved that the prisoner is a left-handed person (b). So, where the manner in which a dead body has been dismembered, for the purpose of concealment, indicates that it has been done by a person having some acquaintance with anatomy; (c) or where the conduct and movements of a person in entering the premises on which a murder is committed, show an acquaintance with the premises, the ways and modes of entrance and exit, the fact of a watch-dog being kept, and the means of avoiding such an obstacle; (d) all these circumstances tend towards identification, by narrowing the range or description of persons within which the offender is to be sought.

(2.) The next class of circumstances which may be employed as means of identifying a criminal agent, are of a more *proximate* character, being directly and physically connected with the person. And these, again, are of two kinds: first, appearances or peculiarities of the person of a criminal as *observed* during the commission of the crime, or about that time, or shortly before or after it, as corresponding with similar observed appearances and peculiarities of the person of the accused; and, secondly, physical coincidences, furnished by objects and appearances, not seen at the time, but discovered *afterwards*.

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(a) *Id.* 476, 477. For other cases in which the position occupied by a criminal was indicated by, and inferred from the position and direction of the marks or wounds made by a gun-shot or pistol-shot, see *Rex v. Patch*, Wills, Circ. Evid. 230; and the *State v. Carawan*, Pamphlet Report, 82, 86.

(b) *Rei v. Richardson*, *ante*, p. 243.

(c) *Commonwealth v. Webster*, Bemis' Report, 402, 403.

(d) *Regina v. Rush*, Burke's Trials, connected with the Upper Classes, 480 481. *The People v. Beehan*, Suffolk (N. Y.) Oyer & Terminer, Oct. 1854.

Under the first of these divisions, the following circumstances may be mentioned.

*Size*, including stature. This circumstance is the one which ordinarily makes the first impression on the sense of vision, when directed towards a particular person; and where it exists in excess, or the reverse, as where the person is unusually large or unusually small, much below or much above the common height, (*a*) it always arrests the attention and impresses the memory. The impression it makes is an instantaneous one, and may be received under circumstances admitting *any* exercise of the faculty perceiving it. Hence it may be observed under circumstances of imperfect light or hurried motion; which would not admit of the observation of minuter peculiarities. If there be light enough to see an individual with any distinctness at all, the outline of his person, which suffices to give an idea of size or stature, must be visible. (*b*) It is moreover a circumstance which cannot, ordinarily, be disguised by artificial means, like other personal peculiarities.

*Peculiarities* of personal appearance. These furnish a great variety of important means of identification. Among them may be mentioned,—lameness, causing a peculiar gait; a habit of stooping or carrying the head on one side; (*c*) unusual breadth of shoulders; (*d*) hair of a peculiar color or length; peculiarity of a particular feature; a conspicuous

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(*a*) In *Barbot's* case, one of the circumstances principally relied on for the identification of the prisoner, was the diminutiveness of his person. 18 State Trials, 1267, 1270, 1275, 1276. And see remarks on the case, *Id.* 1322, 1323. In the case of the *State v. Avery*, the correspondence in stature, between the person seen near the scene of the supposed crime, and the prisoner, was particularly mentioned by the witnesses. See *ante*, pp. 626, 629.

(*b*) In the case of *Rex v. Brook*, (31 State Trials, 1137,) one of the circumstances relied on by the identifying witness, was the size of the person of the offender; and this was observed by a light caused by striking on the stone floor with something like a sword, which produced a flash near his face. *Wills*, Circ Evid. 98.

(*c*) *Regina v. Rush*, *Burke's Trials*, 488.

(*d*) *Id. ibid.*

scar on the face; the want of an eye or front tooth; the want of a finger, or any other visible defect or mutilation.

*Dress.* This is usually one of the first circumstances observed in the appearance of a person, and, where it is in any degree peculiar, furnishes important means of identification. In *Barbol's* case, (*a*) the peculiar dress of the prisoner, (*b*) in connection with his diminutive size, was a principal instrument of identifying him and tracing his movements from place to place. (*c*) But the particular arrangement and details of the dress are not usually so much observed, as some single garment if noticeable from its color, size or material. In *Howe's* case, (*d*) a fawn-skin waistcoat was particularly noticed as an article of the prisoner's dress on the day of the murder. It is the exterior clothing, however, including the hat, which ordinarily makes the first and most lasting impression upon the sense of sight. An overcoat, from its size, will soonest attract attention, and frequently is the only portion of the clothing which is distinctly visible. Hence it is constantly mentioned in testimony descriptive of the persons of assailants and other offenders. (*e*) The exterior clothing, like the *size*, is also frequently distinguishable by very imperfect or transient light. (*f*) But, in one respect, this circumstance of dress is less reliable than other

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(*a*) 18 State Trials, 1229.

(*b*) Described by the witnesses as "a whitish coat, a silver-laced hat, a brown waistcoat, and a long-tailed wig." *Id.* 1269, 1270, 1275.

(*c*) See also, the case of *James Stewart*, 19 State Trials, 107, 108, 109, 110.

(*d*) Stafford Spring Assizes, 1818; Wills, Circ. Evid. 234, 236.

(*e*) In *Howe's* case, the prisoner was observed to have on a dark-colored great-coat, which reached to the calves of his legs. Wills, Circ. Evid. 234. In *Rex v. Brook*, the prisoner was observed to have on a dark-colored top-coat and a dark-colored handkerchief. *Id.* 93. See also *Rex v. Haines*, *Id. ibid.* And see the trial of *James Stewart*, 19 State Trials, 103—113. In *Avery's* case, an attempt was made to identify the prisoner, who wore a brownish-colored surtout-coat and black broad-brimmed hat, on the day of the supposed murder, with a person wearing the same dress, and of the same height, who was seen very near the spot where it was supposed to have been committed. See *ante*, pp. 626, 629.

(*f*) See *Rex v. Brook*, and *Rex v. Haines*, cited *supra* and *infra*.

observed appearances; it being frequently assumed for the very purpose of disguise, and laid aside or destroyed after the crime has been perpetrated.

The *absence* of an article of apparel usually worn out of doors, such as a hat, constitutes another observable circumstance by which a person may be identified. (a)

*Voice.* This circumstance, if at all remarkable, frequently makes a strong and lasting impression on the sense of an observer. In *Harrison's* case, it was very prominently relied on against the prisoner. A witness testified on the trial, that on the same night on which the deceased was found strangled in a hackney-coach in the street, she saw a coach stop at a place named, and heard a person in the coach tell the coachman to go to the house of the deceased, and afterwards saw a person whom she identified as the prisoner, put his head out of the coach, and heard him swear at the coachman for not going faster; and that the latter returned with the deceased, who went into the coach. On afterwards hearing the prisoner speak, in Newgate, before she saw him, she said she knew him, by his voice, to be the same person who swore at the coachman on the night in question. (b) The voice of the prisoner was also a corroborative circumstance in the case of *Rex v. Brook*. (c)

*Physical objects* connected with the person, such as a horse ridden by the criminal, or a weapon held in his hand. In the case of *Rex v. Haines* (d) where three Bow street officers had been attacked in a post-chaise, by two persons on horseback, it was stated by one of the officers that, by the light produced by the flash of the pistols fired, he saw that the horse of the robber who stationed himself at the head of the horses, was of a dark brown color, and of a very remarkable shape, having a square head and thick shoulders

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(a) See the case of *Stewart Abercrombie*, cited *ante*, p. 594, note.

(b) 12 State Trials, 850, 860, 861.

(c) 31 State Trials, 1137. Wills, Circ. Ev. 93.

(d) 8 P. & F. 144; Wills, Circ. Ev. 93.

and such that he could select him out of fifty horses ; and that he had seen the horse since, at a stable in Long-Acre. In *Rex v. Howe* (a) the murdered man, before his death, described his assailant as having a long and very bright pistol.

Under the second division above mentioned, namely, *physical coincidences*, discovered after the commission of a supposed crime, and serving to connect an accused party with the transaction, and by that means to *identify* him as the perpetrator, may be mentioned the following.

*Impressions* made at the scene of crime, by portions of the person of the criminal, or, more commonly, by articles of dress covering such portions ; such as the shoes, clothing, &c. as compared with the shoes, clothing, &c. of the prisoner. These have already been considered at some length. (b).

*Impressions* made at the scene of crime by instruments and objects found in or traced to the prisoner's possession ; such as marks upon the windows of a house, corresponding with a chisel so found or traced ; (c) and the impression upon the seal of a letter mailed (containing an explosive powder,) corresponding with a seal found in the prisoner's possession. (d)

*Marks* made by wounds upon the person of an offender, given with a weapon in the hands of an assaulted party, corresponding with marks visible upon the person of the prisoner. A case is mentioned by Mr. *Best*, where a person, on being attacked by a robber, struck him on the face with a key ; and a mark of a key, with corresponding wards, was visible on the face of the prisoner. (e) In a case mentioned by Mr. *Wills*, where a man had been attacked, thrown down and robbed by three others, one of whom he wounded in the

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(a) *Wills*, Circ. Evid. 284.

(b) See *ante*, pp 264—269.

(c) *Rex v. Bowman*, Allison's Princ. 314.

(d) *Rex v. Palayo*, *Wills*, Circ. Evid. 99.

(e) *Best on Pres.* § 218, p. 297.

struggle, with a clasp-knife, a pair of trousers was found concealed in the prisoner's possession, with two long cuts in one thigh, one of which had penetrated through the lining and was stained with blood at that spot, and the holes had been sewed with thread which was not discolored, showing that the blood must have been applied to the cloth previous to the repair; and a corresponding cut, bound over with plaisters, was found upon the prisoner's thigh. (*a*)

*Impressions* made on the clothing of a prisoner, by the instrument used in committing a crime. A case is mentioned by Mr. *Wharton* as tried in Philadelphia in 1845, where the prisoner's agency was determined by the fact that the profile of a notched hatchet with which the homicide was committed, was found penciled in blood on his handkerchief, with which the hatchet had probably been wiped. (*b*)

*Articles* found near a dead body, or the scene of the crime, and found to have belonged to the prisoner, or to have been in his possession at or about the time of its commission; such as a dirk, (*c*) a razor, (*d*) a hat, (*e*) a razor-case, (*f*), and the like. Even fragments of clothing have furnished physical connections of this character. (*g*)

*Articles* belonging to a deceased person or to the place where a crime has been committed, and found on the person of the *prisoner*, or proved to have been in his possession after its commission; such as a watch, (*h*) keys, (*i*) spectacles, (*j*) and the like.

(*a*) *Rex v. Downtrey*, York Spring Assizes, 1841. Wills, Circ. Evid. 58.

(*b*) *Wharton's American Crim. Law*, 388, (ed. 1855.)

(*c*) *Mendum v. The Commonwealth*, 6 Randolph, 704.

(*d*) *Rex v. Sawyer*, Maidstone Spring Assizes, 1839; Wills, Circ. Evid. 112.

(*e*) *Rex v. Simmons*, Celebrated Trials, 57, 58, (Phil. 1855.)

(*f*) *Rex v. Jones*, *Id.* 90.

(*g*) See *ante*, p. 272.

(*h*) *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, 1841. Pamphlet Report, 16.

(*i*) *Rex v. Smith, Varnham and Timms*; Wills, Circ. Evid. 287.

(*j*) *Rex v. Diggles*, Lancaster Spring Assizes, 1826; *Id.* 53.

*Correspondences* between objects found at the scene of a crime, with other objects found in the prisoner's possession ; as between a bullet taken from the body of a murdered person, and a bullet-mould found in a box belonging to the prisoner. (a)

*Correspondences* between portions or fragments of objects found at the scene of crime, and other portions of objects found on the prisoner, or traced to his possession. These have already been enumerated. (b)

Another means of identifying a criminal, or contributing to his identification, is often furnished by *articles* observed in his possession, about the time of the commission of the crime, and by which his *movements* may be traced from one place to another. In a case of arson, a bundle containing books and other articles, which the prisoner had left at one house, the day before the fire, and at another, the day of the fire, where it remained till afterwards, and which had been observed and was identified by the persons with whom it was left, afforded an important clue to his detection and identification. (c) So, when the object is only generally observed at first, and not minutely examined until afterwards. Thus, in a case of murder, two boxes, which had been clandestinely removed by the prisoner, and, on being traced out, were afterwards examined, were found to contain articles which furnished important means of identifying him as the offender. (d) And even when the objects are not actually seen, but their presence is only inferred from appearances, the same general effect is sometimes produced. As in a case of murder, where the prisoner was observed, shortly after the commission of the crime, with something bulky under his

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(a) *Rex v. Howe* ; *Id.* 284. See *ante*, p. 272.

(b) *Ante*, p. 272.

(c) Trial of *James Hill*, alias John the Painter, 20 State Trials, 1881, 1882, 1888.

(d) *Rex v. Howe*, *ubi supra*.



coat, near a place where a bundle containing articles stolen from the deceased was afterwards found. (*a*)

It is, of course, essential that all such physical objects as have been mentioned should be themselves *identified*, before they can serve as means of identifying the accused. This branch of the subject will be considered in the sequel.

Identification of the person has already been distinguished as being either positive or inferential; the former resting on impressions derived from a general view of the person of the subject, and most commonly from that portion of the person by which one individual is naturally and most effectually distinguished from another, namely, the face or features. It often happens, however, that the process is found to partake of both the positive and the inferential quality; the witness relying partly, and sometimes chiefly, on the close resemblance of the features, and partly upon circumstances connected with the person, such as size, dress, voice, and the like.

There are cases, again, in which, the identity being positively sworn to, and as positively denied, the witness resorts to another class of circumstances of a still stronger character, as tests of the accuracy of his testimony; such as *marks* upon the person not prominently visible, or even such as are quite concealed by the ordinary clothing, and thus invisible to any but one who has been intimately acquainted with the subject, and who consequently possesses the most complete means of knowing its identity. But the possibility of a seemingly exact resemblance between two individuals, even in numerous and minute particulars, must always be taken into account in these cases; and there are instances on

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(*a*) *Rex v. Beards*, Wills, Circ. Ev. 101. See also the cases of *Rex v. Downie*, and *Milne*, (Allison's Princ. 213,) and *Rex v. Bowman*, (*Id.* 314,) where a chisel which had been used by house-breakers, and was left behind by them, served as means of identifying them, and connecting them with several thefts committed in different houses. Wills, Circ. Ev. 50, 51.

record, in which the most confident testimony as to identity, partaking of both the positive and inferential character, has turned out to be founded in entire mistake. With the mention of a few of these cases, the present head of the subject will be concluded.

In the English case of *Rex v. Clinch*, and *Mackley*, (a) the prisoners were indicted for murder, and, upon positive testimony of their identity, were convicted and executed. But it appeared, several years after, that the crime had been committed by others. In the later case of *Rex v. Robinson*, (b) the facts were as follows. A young man, articted to an attorney, was tried at the Old Bailey, on the 17th and 19th of July, 1824, on five indictments for different acts of theft. It appeared that a person, resembling the prisoner in size and general appearance, had called at various shops in the metropolis, for the purpose of looking at books, jewelry, and other articles, with the pretended intention of making purchases, but made off with the property placed before him, while the shop-keepers were engaged in looking at other articles. In each of these cases, the prisoner was positively identified by several persons, while, in the majority of them, an *alibi* was as clearly and positively established; and the young man was proved to be of orderly habits and irreproachable character, and under no temptation from want of money, to resort to acts of dishonesty. Similar depredations on other tradesmen had been committed by a person resembling the prisoner, and those persons deposed that, although there was a considerable resemblance to the prisoner, he was not the person that robbed them. The prisoner was convicted upon one indictment, but acquitted on all the others; and the judge and jurors who tried the last three cases, expressed their conviction that the witnesses had been mistaken, and that the prosecutor had been robbed by

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(a) 3 P. & F. 144.

(b) Sessions Papers, 1824; Wills, Circ. Evid. 91.

another person resembling the prisoner. A pardon was immediately procured in respect of that charge on which conviction had taken place.

In another English case of supposed robbery, tried about the same time with the one last mentioned, the prisoner was saved from conviction (the prosecutor swearing positively to his identity,) by the expedient of placing at his side, in court, another person closely resembling him, and who afterwards proved to be the real offender. (a)

One of the most extraordinary instances on record, of mistaken and disputed identity, in which the close resemblance between two individuals came near baffling a most severe and protracted judicial scrutiny, occurred in the French case of *Martin Guerre* and *Arnaud du Tilh*, in 1580, of which the following may be taken as an abstract. *Martin Guerre* of Biscay, had married a woman of Artignes in 1560. Having afterwards a dispute with his father, he thought fit to leave his family, and absented himself for eight years, without giving them any information as to where he was. At the expiration of this time, a person, afterwards ascertained to be *Arnaud du Tilh*, appeared and represented himself to be *Martin Guerre*. So closely did he resemble the absent man, in features, stature and complexion, that he imposed himself effectually on *Guerre's* wife, as her husband, and lived with her three years, during which time she had two children by him. For the same length of time, he succeeded in deceiving four sisters and two brothers-in-law of *Martin Guerre*, so that no suspicion was entertained of his identity.

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(a) Wills, Circ. Evid. 92. A singular case occurred lately in New York, where the identity of the prisoner was sworn to by a number of witnesses, some of whom persisted in their opinions, even after the jury had rendered a verdict of acquittal, which they did without leaving the bar. *The People v. Mason*, New York General Sessions, 1853. In this case, an action of false imprisonment and malicious prosecution was brought against the prosecuting parties, but resulted in a judgment for the defendants. New York Marine Court, May, 1854.

At length some circumstances led *Peter Guerre*, the uncle of the absent man, to doubt the real character of the supposed husband, and upon the complaint of *Martin Guerre's* wife, *Arnaud du Tilh*, as the individual was now called and claimed to be, was arrested and prosecuted for the fraud before the criminal judge of Rieux. On his examination, a great variety of interrogatories, involving very minute particulars, of *Martin Guerre's* birth, relatives, marriage, &c., was put to him, all of which he answered satisfactorily, the truth of his answers being confirmed by the answers given by *Guerre's* wife to the same interrogatories. In the course of the subsequent investigation, nearly one hundred and fifty witnesses were examined. Of these, between thirty and forty deposed that the prisoner was the true *Martin Guerre*; basing their belief upon intimate acquaintance with him from his infancy, and upon the existence of certain scars and marks upon his person. On the other hand, about the same number of witnesses positively deposed that the prisoner was *Arnaud du Tilh*, whom they well knew. The rest of the witnesses, to the number of sixty and upwards, declared that there was so strong a resemblance between the two persons, that it was impossible for them to say *which the prisoner was*.

The judge, however, thought proper to pronounce a definitive sentence, condemning the prisoner to death, from which he appealed to the Parliament of Thoulouse, who ordered the parties to be confronted in open court. In the course of the personal examination which followed, the prisoner had so decidedly the advantage of the prosecuting parties, (the uncle and wife of the absent man,) that the members were induced to think he was the true *Martin Guerre*. Thirty new witnesses were examined, but without altering the complexion of the evidence as it stood before. For while nine or ten of them were positive that the accused was *Martin Guerre*, seven or eight were as positive that he

was *Arnaud du Tilh*, and the rest were unable to determine, as on the first trial. On examining the whole evidence which had been given, it appeared that forty-five witnesses had affirmed in the most express terms, that the accused was not *Martin Guerre*, but *Arnaud du Tilh*, which they said they were the better enabled to do, because they had *known both* persons intimately, ate and drunk with them, and conversed constantly with them from their very childhood. Various personal peculiarities were referred to by them, such as those of stature, size, shape of the legs, length of the foot, acquaintance with wrestling, dialect and tone of the voice ; in all which the two persons were distinguishable. On the other hand, there were thirty or forty witnesses who swore positively that the prisoner was the true *Martin Guerre*, that they knew him intimately and remembered him from his childhood. Among these were *the four sisters of Martin Guerre*, who were brought up with him, and two of their husbands. The most of these witnesses agreed that *Martin Guerre* had two strokes under his right eye-brow, and that his left eye was blood-shot ; that the nail of his first finger was crooked, and that he had three warts on his right hand, and another on his little finger ; *all of which were visible on the prisoner*.

The parliament still continued in doubt, and considering the nicety of the case, and the consequences of annulling a marriage and illegitimizing a child, began to incline to the accused, and thought of reversing the judgment of the inferior judge, when suddenly *Martin Guerre himself appeared*. He asserted that he came from Spain, gave a distinct account of the impostor who had taken his name, and presenting a petition to the parliament, demanded a hearing, which was granted him. On being interrogated as to the same facts on which the prisoner had been questioned, his answers were true, but they were neither so clear, so positive, nor so exact as those which had been given by the

prisoner. On being confronted with the prisoner, the latter treated *Martin Guerre* as an impostor who had been hired on the part of the prosecution; and conducted himself throughout with such coolness and effrontery, that the question seemed still to remain in doubt; and some began to think there was witchcraft in the business.

At last the court directed that, both the persons being present, the four sisters of *Martin Guerre*, the husbands of two of them, and such of the witnesses as had been most positive in asserting the accused to be *Martin Guerre*, should be called in and obliged to point out him whom they now judged to be *the true Martin*. This final test proved decisive. For, the moment *Martin Guerre's* eldest sister looked upon the two individuals, she distinguished and recognized her brother, and, with tears, declared him to be such, acknowledging her former error. All the rest of the witnesses knew him as soon as they saw him, and there was not one who did not declare that *Arnaud du Tilh* was an impostor.

No doubt now remaining as to the guilt of the prisoner, he was condemned by a special sentence and afterwards executed. Before his death, he made a long confession, from which it appeared that having been mistaken while abroad, for *Martin Guerre*, by some of *Martin's* friends, he determined to take advantage of the error; and that it was from these persons that he obtained all the minute particulars respecting *Martin Guerre* and his relatives, which enabled him to personate the absent man so successfully, and to sustain the searching examinations to which he was subjected, without failing in a single particular. (a)

The case just mentioned was an instance of close personal resemblance being taken advantage of, to perpetrate an

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(a) The above account is abridged from a translation of the original case in the *Causes Célèbres*, contained in the *London Legal Observer* for October 20th, 1832. 4 Legal Obs. 391.

atrocious fraud. In an American case, which will next be mentioned, the same physical circumstance led to the prosecution of an innocent person for a felony. At a court of Oyer and Terminer, held in the city of New York, on the 22d June, 1804, before Mr. Justice *Livingston*, assisted by the Recorder and an alderman, *Joseph Parker* was tried for bigamy under the name of *Thomas Hoag, alias Joseph Parker*. Twelve witnesses called for the prosecution, positively testified to the identity of the prisoner whom they swore to be *Thomas Hoag*. Among these was one of the judges of the court of Common Pleas of Rockland county, who testified that he well knew the prisoner, who had worked for him about a month, during which time he ate daily at his table : that he married him as *Thomas Hoag*, to *Catharine Secor*, on the 25th day of December, 1800 ; and that he was as well satisfied of his identity, as he was of his own. The woman who claimed to have been married to him, and to have lived with him for several months, also testified to his being *Thomas Hoag*, in the most positive terms ; expressing herself to be as well convinced of that fact as she could possibly be of any thing in the world. The belief of the other witnesses was founded not only on the general appearance of the prisoner, but on a number of minute peculiarities by which they had known *Thomas Hoag* to be distinguished ; such as his voice, which was very singular, being shrill, thick, hurried, and something of a lisp ; his smile, which was very peculiar ; a habit of shrugging up his shoulders ; a scar on his forehead, partly covered by his hair ; and another scar on his neck. *All these peculiarities were observable in the prisoner*. On the other hand, eight witnesses positively testified that the prisoner was *Joseph Parker*, as they knew from intimate acquaintance with him : and some of them further declared that, about the time when he was charged with having been married in Rockland, he resided in New York, and was never absent from there any length of time.

Among the marks sworn to have been observed on the person of *Thomas Hoag*, was a large and visible scar under one of his feet, occasioned by his having trodden on a drawing-knife, which some of the witnesses swore they had seen. This proved to be a decisive circumstance in the prisoner's favour. For on exhibiting his feet to the jury, not the least mark or scar could be seen upon either of them. It finally appeared that the prisoner had been regularly upon duty as a watchman, in the city of New York during the months of October, November and December, 1800, and of January and February, 1801; and particularly that he was upon duty there, on the 26th December, 1800, the day after that on which he was charged with having married in Rockland. The jury, without retiring from the bar, found a verdict of "Not Guilty." (a)

## II. *Identification of Things.*

Things, in their character of subjects of identification, for the purposes of judicial proof, may be divided into the following classes: the subjects of crime, the instruments of its commission, objects found near the scene of crime, or in the possession of criminals; and handwriting. And the process of identification, as applied to each of them, may be, as in the case of persons, either positive, or inferential, or compounded of both.

### 1. *Subjects of Crime.*

The most common class of things comprised under this head, consists of articles claimed to have been *stolen*. And

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(a) See the Report of the Trial in 1 Hall's American Law Journal, 70, and also in the appendix (No. 4,) to Edwards' Juryman's Guide, New York, 1831. The author of the last mentioned work states, in a note to the case, that *Parker* was then still living in the city, and that the alleged wife continued to be so infatuated on the subject of her marriage to him, as to upbraid him, whenever she met him, and would point his attention to her daughter, as if the latter were their joint offspring.



these may be considered under the three divisions of goods or merchandize, specific articles of personal property, and money.

(1.) *Goods or Merchandize.*

The most satisfactory means of identifying property of this description is by marks existing upon the goods themselves ; such marks being known to the identifying witness, and enabling him to swear positively that the goods found and shown to him with such marks upon them, are the same with those claimed to have been stolen. The mere general appearance of goods, which are without marks of this character, ordinarily leads to no more definite conclusion, and no nearer approach to identification than that they are of the *same kind*, which, as already shown, is, without other circumstances, insufficient evidence for the purpose in view. (a)

There are some descriptions of goods, however, which do not admit of being thus specifically designated by marks, such as grain kept in bulk in a barn. There are other descriptions, again, which are no farther susceptible of being marked than as their outer coverings, cases or receptacles may be thus designated, and which lose these marks, in the act of being taken out of such receptacles ; such as sugar taken from casks, grain from bags, tea from chests and the like. In these cases, similarity of description is the only quality which the articles themselves retain ; and this frequently serves as a basis of identification, when corroborated by other circumstances. Thus, as in the example given on a previous page, (b) if a man be found coming out of another's barn containing grain, and upon being searched, grain is found upon him, of the same kind as that in the barn, it is a fair inference that he took the grain from the

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(a) See *ante*, p. 458.

(b) *Ibid.*

barn. (a) So, persons employed as laborers in carrying goods to or from ships, wharves and warehouses, or at work in stores or warehouses containing goods, have been convicted of larceny, upon evidence that they were detected with property of the *same kind* upon them, recently after coming from such places. (b) One or two American cases of proof of identity by this kind of evidence, may be here mentioned. In a New York case, (c) the facts were as follow. A quantity of silk handkerchiefs (in the piece,) being missed from store-packages lying open for sale, goods of the same description were traced to the possession of three persons (blacks,) who had labored about the store the same day, and had sold the goods to a woman, alleging that they were the ventures of some young men who had recently returned from sea. A gross of buttons, stolen at the same time, and which had been sold by one of the prisoners to the same woman, was identified with absolute certainty. The identity of the handkerchiefs was holden to be well made out by these circumstances. In another New York case, (d) where a habitual laborer about a store was indicted for stealing bank-bills and sewing-silk, the evidence was—that the prisoner was well acquainted with the premises; that the upper part of the store had been entered from the cellar, by breaking through a particular passage of which a stranger would have been ignorant; and that bills, some of them of the same denominations with those taken, were afterwards found on the laborer, which a clerk in the store believed to be the same as those missed from a desk in the store, which had been broken open. The laborer had sold silk of the same description as that which was missed. These

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(a) 2 East's P. C. 657.

(b) *Id. ibid.* and see 2 Russell on Crimes, 125. Wills, Circ. Evid. 55, 108

(c) *The People v. Ferguson, et al.* 1 City Hall Recorder, 65.

(d) *The People v. Williamson, Id.* 115.

circumstances were left to the jury to determine the question of identity, and they found the prisoner guilty.

(2) *Specific articles of Property.*

These are identified either by general appearance, or particular marks, or by both of these means in conjunction. The facility of identification by mere general appearance, and the value of the evidence in itself, depend, obviously upon the familiarity of the witness with the subject of the testimony. An article of property which has been seen and handled daily, especially when worn upon and carried about the person, acquires by use and time a general exterior which, to the eye of the owner or wearer, sufficiently distinguishes it from others of the same kind. A pocket-book or an article of apparel may be easily identified in this way. Indeed, in the case of clothing, we have seen that it is admitted to be often impossible for the identifying witness to assign any particular reason for his knowledge. (a) It occasionally happens, however, that the most positive impressions as to the identity of such articles, obtained in the way just mentioned, prove to be fallacious, in consequence of the number of articles which may have been manufactured or made up in the same way, and out of the same material, producing a close resemblance among several,—a resemblance which similar use and wear, for a similar length of time, serve to complete and confirm. A remarkable instance of deception, arising from these causes, occurred in the English case of *Rex v. Carter*, (b) mentioned by Mr. *Wills*. A youth was tried at Stafford Assizes, on a charge of stealing a pocket-book containing a five pound note. The evidence showed that the prosecutrix left home, to go to market in a neighboring town, and having stooped down to look at some vegetables exposed to sale, she felt a hand resting upon her shoulder, which, on rising up, she found to

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(a) *Ante*, p. 684.

(b) *Coram* Mr. Baron *Garrow*; *Wills*, *Circ. Evid.* 106, 107

be the prisoner's. Having afterwards purchased some articles at a grocer's shop, on searching for her pocket-book, in order to pay for them, she found it gone. Her suspicion fell upon the prisoner, who was apprehended, and upon his person was found a black pocket-book, which she identified as that which she had lost, but it contained no money. Several witnesses proved that the prisoner had long possessed the pocket-book, but some discrepancy in their evidence, in other respects, led to the suspicion that the defence was a fabricated one, and the jury returned a verdict of guilty, and the prisoner was sentenced to be transported. During the continuance of the assizes, two men who were mowing a field of oats through which the path lay, by which the prosecutrix had gone to market, found in the oats, close to the path, a black pocket-book containing a five pound note. The men took the money and pocket-book to the prosecutrix who immediately recognized them, and the committing magistrate dispatched a messenger, with the articles found and her affidavit of identity, to the judge of the assize-town. The prosecutrix must have dropped her pocket-book, or drawn it from her pocket with her pocket-handkerchief; and had clearly been mistaken as to the identity of the pocket-book produced upon the trial.

That a person may be deceived by the appearance of an article of dress, so far as to swear to its identity, was shown in the Scotch case of *Rex v. Webster*, (a) in which a girl swore to a white gown found in the prisoner's possession, as being her property; but which, on a minute examination, she became satisfied was not hers, though very closely resembling it. (b)

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(a) Burnett's Crim. Law of Scotland, 558.

(b) The truth was elicited, in this case, in consequence of the suggestion of one of the jurors, just before the case was closed by the prosecutor, that the girl should put on the gown. This appeared rather a whimsical proposal, but was agreed to by the court; when it turned out, to the surprise of every one present, that the gown *would not fit* her person. She then examined it more minutely, and at length said it was not her gown. The prisoner was of course

The close resemblance necessarily existing among a number of articles of the same size and color, which have been manufactured out of the same material, and after the same pattern, has already been mentioned as a source of deceptive impressions of identity in regard even to articles most familiarly known to the person claiming them. There are cases in which this resemblance amounts to absolute completeness in every respect, as where several medals have been struck from one die. In such cases, a resort to particular marks which have been accidentally or intentionally put upon the article, becomes absolutely necessary to determine the question of identity. (*a*)

It is possible, however, that marks, even of a supposed peculiar character, may prove fallacious as means of distinguishing and thereby identifying articles of property. Cases have occurred in which, by a singular coincidence, precisely the same mark has been put upon an article in precisely the same form and way, by two different persons claiming to be its owners. An extraordinary case is mentioned by Mr. *Wills*, in which a cask, among other articles claimed to have been stolen, and which was identified as the property of the prosecutor, by the mark "P. C. 84," enclosed in a circle, at one end of it, was proved to be the prisoner's by the very *same* mark. (*b*)

The sources of the most accurate impressions of the identity of specific articles of property are undoubtedly to be found in the general appearance of such articles, as confirmed by marks upon them. The identity of articles long possessed and familiarly known is often established in this way. The impression of the witness is, in the first instance, derived from and based upon general appearance, and he is frequently disposed and content to rest it on that foundation alone.

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acquitted, though it afterwards appeared that he had stolen the gown from another person.

(*a*) See further, under the head of "Money," *post*.

(*b*) *Wills*, *Circ. Evid.* 105.

But if led, or required to examine the article closely, he finds upon it marks made either by time, accident or pure intention, (such as fractures, abrasions, indentations, fissures, scratches, rents and stains, as well as letters and figures put upon it,) which he at once recognizes as the same with those which the article had while in his possession; and hence superadds to his first positive opinion the inferential one derived from the examination. Opinions made up in this way rarely prove unfounded.

### (3) *Money.*

Money, whether in the shape of bank-notes or coin, belongs to that class of things which cannot, without the aid of circumstances, be identified by mere general appearance. This is particularly the case with metallic money. The impressions which give it value and currency, being produced in large numbers from the same die, render the individual pieces, especially when newly coined, so entirely and exactly similar in the minutest details, that no one piece can be distinguished from another of the same denomination and issue. The mere fact, therefore, that a coin, lost and charged to have been stolen, is of the same denomination and issue with a coin found in another's possession, although an approach to identification, falls far short of proof of that fact. Indeed, it has been shown in a former part of this work, (a) that even the exact coincidence between a particular combination of denominations of ordinary coin, contained in a purse lost, and precisely the same number of coins of the same denominations, contained in a purse found on another's person, would not, of itself, amount to proof of identity. Again, not only are the pieces of coin, when new, precisely similar, but the same degree of use and wear to which they are, in general, subjected, continues to preserve the same resemblance. It is indeed, extremely difficult, if not impos-

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(a) *Ante*, p. 171.

sible, to say of any coin, however old or rare, that there are not two pieces in existence, exactly similar. The only effectual means, therefore, of identifying metallic money, is by peculiar marks upon the individual coins, produced either by accident in the process of coining, or in the course of wear, or intentionally made either for the express purpose of identification, or out of mere wantonness ; such as scratches, bruises, abrasions, indentations, discolorations by heat or chemical substances, and the various mutilations by clipping, perforating, hammering, and the like, so commonly seen upon silver money. Sometimes, though more rarely, the process of mere wear is found to communicate to a coin an appearance by which it is more easily distinguishable from others of the same denomination and issue.

In regard to paper money, the same observations are for the most part applicable. The complete similarity necessarily given to notes of the same denomination and of the same bank, by their engraved portions, is little affected by the written portions, or filling up, which also bear a close resemblance to each other ; the only real difference consisting in the bank numbers and letters and the dates, which, however, are rarely so much as noticed by the majority of holders of the money. Hence the necessity of resorting to marks upon the particular note or notes in question ; such as the bank letter and number already mentioned, but more commonly marks intentionally made by the holder, or accidentally produced in the course of circulation, such as stains, rents and mutilations of various kinds.

The actual identification of paper money is, however, often dispensed with, to a considerable extent, when there are other circumstances from which the general inference of guilt may be drawn. Thus, in a case in Massachusetts, where the prisoner had been indicted for stealing a package of bank-bills in December, it was held that evidence that two of the bills, (which were identified,) each of the de-

nomination of one hundred dollars, were in the defendant's possession, one of them in March, and the other in April following, might be submitted to the jury, and that they might infer therefrom, and from accompanying circumstances, that he stole the whole package. It was held, also, in the same case, that although *none* of the stolen bills were identified, yet that evidence was admissible to prove that the defendant, after the larceny, was in possession of two one hundred dollar bills *like* those that were proved to have been stolen, and also of a large amount of other bank bills; and that such evidence, together with evidence that the defendant was destitute of money before the larceny, might be submitted to the jury, to be considered by them in connection with other accompanying circumstances indicative of his guilt. (a)

## 2. *Instruments of Crime.*

Where an instrument or weapon with which a crime may be committed is found near the subject or scene of the crime, such as a pistol near a body found dead, or a chisel in a house which has been broken into, especially if accompanied by indications of having been actually used for the purpose, the great object of inquiry is to trace it to some particular individual as its owner or possessor, or to identify it as either belonging to an individual who may be suspected as the perpetrator, or as having been seen in his possession about the time when the crime was committed. Where the instrument has been stolen, borrowed, purchased, or ordered to be made, recently before the commission of the crime, and for the express purpose of committing it, the requisite proof is made by the owner, seller or maker identifying the article, as in the case of stolen property, with the addition of identifying the person who stole, obtained or

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(a) *Commonwealth v Montgomery*, 11 Metcalf, 584.



purchased it from him ; and the evidence adduced for this purpose, in such cases, is often very complete and satisfactory. But identification by witnesses, who have merely seen the instrument in the possession of the suspected or accused party, especially where they speak from impressions produced by general appearance only, is a more difficult process, and frequently fails on the trial. Where particular marks, however, have been observed upon the article thus seen, the witnesses are enabled to speak with more confidence ; and a mere general view of such marks, if accompanied by other circumstances, has been allowed as sufficient proof of identity. (a)

Again, there are some marks upon articles believed or shown to have been used as instruments of crime, which enable the inference of identity to be drawn by *any* person to whom they may be exhibited, such as the owner's name written, scratched or engraved upon them. But a very minute examination is sometimes necessary to the discovery of such marks of ownership. In an English case, where a razor was found in a wood near the spot where a murder had been committed, no means of its identification were visible until an *optician* showed, satisfactorily to the jury, the name of the prisoner, scratched in rude letters on the handle. (b)

3. *Objects found at the scene of crime, or in the possession of the accused.*

Objects, other than the instruments of crime, are sometimes found near the scene of its commission, which it becomes highly important to identify, either as a ground of suspicion against a particular individual, or as confirming suspicions arising from other circumstances. Articles of

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(a) See *Mendum v. The Commonwealth*, 6 Rand. 704 ; where the corroborative circumstances were quite remote in point both of time and place.

(b) *Regina v. Sawyer*, Maidstone Spring Assizes, 1839 ; Wills, Circ. Evid. 118.

personal use or wear, such as a hat, a handkerchief, a pair of gloves, a razor-case, may be identified, by persons who have previously seen them in the possession of the accused. But the same difficulty is often found to arise in these cases, as in the case of the attempted proof of the identity of actual instruments, and from the same cause; namely, the inability or indisposition and refusal (sometimes unexpected,) of the witness to swear to the fact of identity from the mere general appearance of the article shown him. (*a*) Where the identification rests upon minute physical coincidences, which may be observed and tested by any person, being essentially a mechanical process, it is often very satisfactory: as where a piece of bloody cloth found near the body of a murdered person, is ascertained, by physical adjustment and minute inspection, to have been torn from the clothing of the prisoner. (*b*)

In regard to articles found in or traced to the possession of an accused party, which it becomes necessary to show to have belonged to a deceased and supposed murdered person, such as a watch, the requisite proof of identity is made by the testimony of persons who have often seen and handled the article during the owner's life; and where such testimony is confirmed by that of the person from whom the deceased purchased it, or who has afterwards had it in his possession for the purpose of repair, it amounts to evidence of the most satisfactory character. (*c*)

#### 4. *Handwriting.*

Important links in a chain of criminative evidence are often furnished by *letters* written by the accused, as to an accomplice, to the person upon or against whom the crime

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(*a*) *Rex v. Jones*, Celebrated Trials, 90, 94, (Phil. 1835.)

(*b*) *Rex v. Johnson and Fare*, 5 Lond. Legal Observer, 254, 257.

(*c*) See the case of *The State v. Robinson*, Middlesex (N. J.) Oyer and Terminer, March, 1841. Pamphlet Report, pp. 14, 20.

has been committed, and, in some instances, to other persons. Where these are in the ordinary hand of the accused, they are identified in the usual way of proof of handwriting, upon which it will not be necessary to dwell. But it more commonly happens that they are in hands more or less completely *disguised*, and this introduces a kind of proof which is in its nature thoroughly circumstantial; being based upon a minute and sometimes literally microscopic examination of particular words and letters, with a view of detecting those involuntary adhesions to the natural manner of writing, which, from the pure force of mechanical habit, maintain their existence in the most elaborate specimens of imposture and fraud, and can seldom be completely excluded from them. A very prominent instance of this kind of proof occurred in the case of *Commonwealth v. Webster*, in which, out of three letters which it became important to trace to the prisoner, one was marked by the most extraordinary characteristics. In order, apparently, to give greater effect to the deception intended, the use of the ordinary pen was avoided, and the letters were made with a marking instrument called "a cotton pen;" some of the words being so rudely shaped as to be almost illegible, and the coarse heavy strokes produced throughout, giving to the entire letter a most singular aspect. (a) The more thoroughly (as it would appear) to guard against involuntary adhesions to the natural manner, some of the letters were rudely *printed*; and to secure the deceptive effect of the whole, the manner of an illiterate person, in regard to spelling, punctuation and the like, was studiously counterfeited; the letter being moreover written in a straggling, uneven manner, upon a torn scrap of paper. (b) Yet, under all this exterior of

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(a) Hence it was not very inaptly designated by one of the counsel on the trial, as "the Sanscrit letter." Bemis' Report, 441.

(b) A fac-simile is given in Bemis' Report, 210, 211. And see *ante*, pp. 482, 483, and note (a) *ibid*.

ingenious and labored uncouthness, the practiced eye of an expert was enabled to detect those traces of the usual and natural manner which have been alluded to, and the existence of which was afterwards confirmed as the truth by the confession of the prisoner himself. (a)

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## SECTION V.

### *Psychological Considerations.*

What have been termed *psychological* facts are always found to constitute a most important division of the elements of circumstantial evidence. They exhibit the outward and visible conduct, as it is prompted and directed by the *mind*—the real source and seat of all guilt; and, could they be uniformly reached and developed with certainty, would be decisive of almost every case proposed for investigation. But as they arise from causes and consist of operations too subtle and latent to be the objects of sense, they can be arrived at only indirectly, (and therefore not always with absolute accuracy,) through facts of the physical class, by processes of presumptive reasoning which have already been explained.

Among facts of this description, *motives* and *intents* are especially prominent. So far as these may be considered as the general inducing causes of a criminal act charged, or as giving to such act its criminal quality, they have already been sufficiently dwelt upon. (b) But they also constantly occur for consideration in a more limited view and appli-

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(c) Bemis' Report, 204, 207, 571. And see further, on the subject of identification of handwriting, Wills, Circ. Evid. chap. 4, sect. 3.

(d) See *ante*, pp. 281—328.

cation; namely, as illustrative of the significance and bearing of *particular* and *minor* facts of conduct, in their character of portions of a body of presumptive evidence.

The motive and intent, then, of any particular fact of conduct, which it becomes requisite to use as evidence for a criminative purpose, are arrived at by looking carefully at all the minuter circumstances and incidents by which such fact has been accompanied. This is particularly true of the fact of *intent*, which more immediately and effectually gives to the act in question its criminal aspect and quality. (*a*) The essential point to be established in connexion with facts of conduct in every case, is that the party actually intended or willed to do the act which it is proved he did, and that he also intended to produce the consequence which actually flowed from it; and this may be very effectually done in the presumptive way already mentioned. If the accompanying circumstances show that the act was a deliberate one; that it was repeated, almost immediately; that it was done, on both occasions, in the face of opposition; and that it was followed by an exhibition of feeling, showing a positive interest in it, and in its result; the defence that it was accidental or unintentional, or done out of mere thoughtlessness or inadvertence, will be excluded. In the case of *Donellan* which has already been particularly examined, (*b*) his conduct in rinsing the medicine phials, and then destroying their contents, was shown to be wilful, by means of circumstances of this description, in the clearest manner. He first asked for the phial out of which the deceased had taken the draught, and had it particularly pointed out to him; showing that he meant to act upon thorough information. He next deliberately poured water into it from another vessel, shook it and emptied the contents; and this against the expressed wish and sharp remonstrance of an-

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(*a*) See *ante*, p. 284.

(*b*) *Ante*, pp. 604—620.

other person present. He then repeated the same conduct with another phial, in the face of similar remonstrance. He then ordered the bottles and the basin into which he had poured their contents to be carried away, and gave to his conduct in this particular the shape of an *actual contest* with another person who was endeavoring to prevent him. And finally, after he had succeeded in procuring the removal of the articles, he expressed anger that he had been thus opposed and striven with. All this went incontestably to show that he had *intended* to do what he did, and to produce the consequence which followed; namely, the destruction of all the evidence of what the phials had contained. (a)

The unfavorable bearing of this conduct, and the light in which it would naturally be viewed by others, were considerations which seem to have, almost immediately, struck the mind of *Donellan* himself, and that so forcibly as to compel him to attempt an explanation of it. In doing this, he chose to recur to his *motive*. He undertook to say what it was that *induced* him to act as he had done. He rinsed the phials, he said, “in order *to taste*” their contents. But, looking at this assignment of motive in the light of the accompanying facts, we are enabled to detect its falsity, while the same facts serve as means of discovering what was the real motive at work in the case. It was shown that he tasted but one phial, and that he *did not taste* the phial which was pointed out to him as having contained *the draught* which had occasioned the alarming appearances and symptoms observed, but rinsed out and threw away the contents immediately. The excuse, therefore, had, in point of fact, no application to the case and no reasonable meaning whatever, and its falsity might, on this ground alone, be pronounced apparent. But supposing he had tasted both, how

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(a) In a defence of the prisoner, written after his execution, this conduct was placed in the light of mere imprudence and want of proper consideration. *Celebrated Trials*, 176.

does this explain or excuse the acts of *destruction* which followed, and which were completed by the suppression of all mention of them (even by way of allusion) to the apothecary who had been sent for, for the purpose of making the very examination which was thus frustrated? Besides, if he had rinsed the phials, to taste them, his only reasonable object in tasting could have been to ascertain what they had contained; and under the shocking circumstances of the case, it would have been natural to expect that he would have expressed *some opinion* or belief, as the result;—that there was or was not something extraordinary, if not actually noxious, in the draught which had been taken; and that the apprehension expressed by Lady *Boughton* that the alarming appearances which were still visible upon the body of her son, were attributable to it, was or was not unfounded. But not a word to that effect was said. All these circumstances, while tending to show that the motive assigned was not the true one, serve positively to indicate what the real motive was, namely, a desire to conceal the cause of the death, as quickly as possible, and by the most effectual means.

The *motives*, therefore, as well as the intents of particular acts on the part of an accused person, may often be very satisfactorily explained by the aid of the light, which accompanying circumstances afford; and, in this way, all facts of conduct which are made to appear in evidence in any investigation are subject to be interpreted. And this species of natural construction is materially aided by one of the most general rules of presumption in nature, as well as in law:—that every sane person is presumed to know, and therefore to intend, the natural consequences of his own voluntary acts. (a) And this rule again is founded upon another, of still more general character and of universal application; namely, that every person endowed with an ordinary measure of sense and discretion, is presumed to be

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(a) See *ante*, p. 809.

able to perceive and understand the relation of cause and effect, especially in its application to common and familiar subjects, to estimate that relation in its proper character, and to act accordingly.

There is much, however, in courses of criminal conduct, when closely analyzed, which distinguishes them from any ordinary course of human conduct, entered upon from a particular motive and carried on to a certain desired end or result; showing, at times, a singular blindness to the existence of the relation just mentioned; or, an equally singular disregard of it, if properly apprehended and appreciated. And this reveals a feature of crime of the very highest importance to be kept in view, in investigations of its cause, namely, its frequent *inconsistency* with itself; a quality which it might not be difficult to show to be inherent in its nature, and which, in some recorded instances, (to be presently mentioned,) has exhibited itself in the most glaring form.

But the existence of this peculiar quality is often either not perceived or not admitted, especially on occasions of defending persons accused of crimes of the higher grades. It is a common practice to treat crime, considered in an abstract or general point of view, as a course, development, or exhibition of human conduct, which, however morally wrong, is mentally and logically correct; that is, as exhibiting, in all its stages, a clear perception and true appreciation of relations and consequences; and, in particular, a prudent, consistent and vigilant regard to the criminal's own *interest*, and to that great leading policy of *secrecy* by which he is enabled to accomplish the two successive objects of committing the crime and escaping discovery. Hence, where, in any particular case under investigation, the evidence goes to show a departure from this assumed general policy or rule of crime, and fixes the imputation of irrationality or folly upon the accused, by proving him to have done



an act, the natural (if not obvious) tendency of which was to expose himself to discovery, it is made use of as an argument to show the improbability of his guilt. In the common phrase used on such occasions, "he would not have been *such a fool* as to have acted thus;" or, "he must have been *a fool* to have done so." Thus, in *Corder's* case, the prisoner, in a written defence read by him on the trial, dwelt on the fact that the place to which he went, in company with the deceased, on the day they were last seen together, and where her dead body was afterwards found, was a place surrounded by cottages, and that they went there in the middle of the day; and then asked whether it was likely that he would have thus exposed himself to the danger of discovery, had he intended to commit murder. (a) And yet, before execution, he fully confessed the crime. (b) Indeed, in some cases where acts of this character have been clearly proved to have been done by the prisoner, they have been laboriously and ingeniously dwelt upon as proofs of a disordered mind. Thus, in *Mrs. Spooner's* case, where it was shown that the female criminal, immediately after the murder, gave to her male accomplices the watch of the deceased, and various articles of his wearing apparel, which were subsequently found on their persons, and, being easily identified, aided materially in their detection and apprehension; it was argued that this was not the conduct of a person in the *exercise of reason*. (c) And the radical circumstance of her entrusting the commission of the crime to strangers and foreigners (two of the murderers having been British soldiers,) was dwelt on as showing the same fact. (d)

It is undoubtedly true that the general policy of crime is secrecy, or avoidance of human observation, and that much

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(a) *Rex v. Corder*, Celebrated Trials, 215, 228, (Phil. 1885.)

(b) *Id.* 224.

(c) 2 Chandler's American Crim. Trials, 81.

(d) *Id.* 82, 38.

sagacity and vigilance are ordinarily exercised in adhering to it. And it is on this very account, as already shown, that the proof of crime, by means of circumstances, is so often a difficult, uncertain, imperfect, and ineffectual process. But it is not less true that, in many instances, this policy is more or less widely departed from, and that the criminal *does not* keep in constant view what is supposed to be (by a kind of necessity,) the great ruling principle of his conduct,—a careful regard to his own interest. This, indeed, is manifest from the very fact of the existence and availability of the materials or elements of circumstantial evidence itself; they being nothing more than *traces of action* which the actor *has failed to conceal*. Were the policy just mentioned perfectly and consistently adhered to, few of these traces of crime would ever be discoverable.

Hence, on a careful analysis of criminal conduct, as displayed in actual cases, we often find an ingredient of thoughtlessness, carelessness or negligence, amounting sometimes to what appears as actual *folly*, and even absolute *stupidity*, present in union with great shrewdness and sagacity; bringing prominently to view the quality of *inconsistency*, which has been adverted to.

Looking at the two successive objects which every criminal may be supposed to contemplate,—the commission of the crime and the avoidance of its consequences,—it is in planning and effecting the former, in preparing the necessary means, and watching the necessary opportunity, that what may be called *the art of crime* is most apt to be fully exhibited. It is in getting access to the coveted property, or in getting the intended victim within desired reach, that the criminal is found to exercise the greatest amount of skill and ingenuity. The object of action, thus far, lies within a limited compass, and the action itself is, in its nature, more entirely within his own control. Thus, up to a certain point, he is often found to reason correctly, to

observe vigilantly and in all directions, and to adapt his conduct to its anticipated results in the nicest manner. But even to this course of conduct there are found exceptions; constituting sources of what has already been treated of as *precedent* circumstantial evidence; such as hints, in the presence of others, at the act in contemplation; declarations of intention to do it, and even threats to do it: (a) showing the intensity of the desire to attain the first or immediate object in view, as blinding the mind to the necessity of regarding the other, or ulterior and consequent one.

But it is beyond the point just indicated,—that is, immediately after the crime, or even during the act of commission, and sometimes just before,—that the sagacity and vigilance of the criminal most commonly begin to forsake him; and he is found to leave one, and another, and another trace of himself, exposed to view, without any adequate attempt at concealment. What greater folly, for instance, can be conceived, than to set out for the scene of a contemplated murder, when the ground was covered with newly-fallen snow, which would certainly show the impression and direction of every footstep; and with shoes which would as certainly give to such impressions a peculiar character, suggesting and ultimately leading to the decisive mode of proof and detection by comparison? Or what greater folly than to convey the murdered body to a place where it was sure to be found and traced back to the premises of the murderers? Yet these were the actual facts in recorded instances. (b) This species of folly is ordinarily exhibited in the negative form of carelessness and omission. But it sometimes occurs in the grosser form of actual commission; the criminal (in effect) deliberately framing evidence against himself.

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(a) See *ante*, pp. 331, 338, 340.

(b) See the case of *Mrs. Arden*, *ante*, p. 264. See also the case of *Rex v. Smith, Varnham and Timms*, *ante*, p. 265.

Perhaps in no instance was this inconsistent quality of criminal conduct, this union of great sagacity and caution with unaccountable thoughtlessness and folly, more strongly exemplified than in the case of *Fauntleroy*, who was executed in England for forgery, in October, 1824. (a) In this case, the prisoner had carried on a course of forgery for several years, by means of which he had fraudulently obtained the transfer of stocks entered in the Bank of England, in the names of various persons, and amounting in the whole to considerably over 100,000*l.*; and had managed his proceedings throughout with so much art and success, by means of false entries and fictitious accounts, as to escape the notice even of his own partners in business. But, by an extraordinary infatuation, while these proceedings were going on, the criminal took the step of committing his secret to writing; and in a document penned and signed by himself, though carefully kept among private papers, most explicitly *declared the whole fact of his guilt*. This document having been found in his possession on his arrest, operated against him as unanswerable evidence, and with the most fatal effect. (b)

A few other cases may be here referred to, as illustrating the same point. In the Scotch case of *Nairn* and

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(a) Celebrated Trials, 19. (Phil. 1835.)

(b) The following is a copy of this singular paper. "Consols, 11,151*l.*; standing in the name of my trusteeship, 8000*l.*; *E. W. Young*, 6000*l.*; consols, General *Young*, 5000*l.*; Long annuities, *Frances Young*, another 6000*l.* *Lady Nelson*, 11,595*l.*; Mrs. *Ferrer*, 20,000*l.* 4 per cents; Earl of Ossory, 7,000*l.*; *T. Owen*, 9400*l.*; *J. W. Parkins*, 4000*l.*; Lord Aboyne, 6000*l.*; *P. Moore* and *John Marsh*, 21,000.—In order to keep up the credit of our house, *I have forged powers of attorney*, and have thereupon sold out all these sums, without the knowledge of any of my partners. I have given credit in the accounts for the interest when it became due. May 7th, 1816. (Signed,) *Henry Fauntleroy*." And then followed, at the foot of the paper, these remarkable words, disclosing another motive to the crime than the mere desire of gain, and throwing not a little light on the cause of such a record being kept. "The bank began first to refuse our acceptances, and thereby to destroy the credit of our house; *they shall therefore smart for it.*"

*Ogilvie*, (a) the female prisoner seems to have made no secret of her intention to poison her husband, and although a great degree of art and caution was used in getting possession of the poison, and in mixing it with the victim's food, the crime was no sooner committed than the same party is found endeavoring to prevail on the medical attendant who was called in, to conceal whatever he might think to have been the cause of the death. In the case of *Burdock*, (b) another case of poisoning, the prisoner actually mixed the poison in the gruel intended for the deceased, in the presence of a servant; and although some attempt at disguise and deception was made by giving it the character of a medicine, this was more than neutralized, and a palpably suspicious aspect given to the whole transaction, by her caution to the servant "not to tell the deceased that there was any thing in the gruel, as, if she knew there was, she would not take it, and would think they were *going to kill her*." In *Green's* case, (c) also a case of poisoning, the prisoner's course was marked by a similar neglect of the art and precaution supposed to be characteristic of the commission of a great and premeditated crime. His disregard of the prescriptions of the medical attendant, and his continued administration of the same *white powder* in every article of medicine and food prepared for the sick, had the effect, which might have been foreseen, of attracting attention to his movements; and his suffering the articles in which the powder had been mixed, to remain within reach of observation, was attended with another result, which also might have been anticipated,—examination to see what the powder was, and consequent discovery of its real poisonous character. In short, the criminal observed just enough of secrecy and disguise to excite suspicion and draw upon himself its natural consequences.

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(a) *Rex v. Nairn and Ogilvie*, 19 State Trials, 1235.

(b) *Rex v. Burdock*, Best on Pres. § 196.

(c) *The People v. Green*, Rensselaer (N. Y.) Oyer & Terminer, July, 1845.

In crimes of a comparatively petty character, the same singular disregard of relations and consequences is sometimes found to take place. Thieves and receivers of stolen goods have been known to keep the stolen articles in their possession, with the owner's marks still apparent upon them, thus furnishing a means of immediate identification and detection. (a)

The *causes* of this singular and sometimes sudden blindness to the criminal's immediate and obvious interest in the case, and this disregard of what may be called the necessary policy of his conduct, may now be more particularly examined. The circumstance of creating evidence against himself, in the way of *omission*, (that is, by omitting to destroy the impressions and vestiges of his own action,) sometimes arises from the self-imposed *necessity* of the case. In entering upon the actual perpetration of a great crime, the criminal commits himself to the issues of events which he can neither foresee nor perfectly control. With the best contrived plan of proceeding, and the best adapted means of action, he often encounters, and sometimes at almost every step, difficulties and obstacles, against which no provision (or no effectual one,) could be made. A trifling accident may serve to endanger the whole enterprise. The premises sought to be invaded are found to be secured with unusual care; the intended victim takes the alarm, and makes a long and desperate resistance, with cries of distress which violence cannot wholly stifle. (b) To deal the mortal blow and escape for his life, is sometimes all the murderer can do. He has *no time* for acts of concealment which often take whole days and nights to perform them adequately. (c)

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(a) *The People v. Teal*, 1 Wheeler's Crim. Cases, 199, 201.

(b) See the case of *The People v. Beehan*, Suffolk (N. Y.) Oyer & Terminer, October, 1854.

(c) See the cases of *The State v. Carawan*, Beaufort County (N. C.) Superior Court, Fall Term, 1853; and *The People v. Colt*, New York Oyer &

Again, this omission or neglect to conceal the traces and evidences of criminal action, even when present to the actor's view and within his reach and control, may be attributed to that *confusion* of mind and memory, which, particularly in cases of inexperienced offenders, is often found to attend the commission of great crimes, and occasionally wholly frustrates their accomplishment. The murderer *forgets* that his feet are making the impressions which are to lead to his discovery. The thief *forgets* to erase from the article which he has stolen, the owner's marks; or he trusts to superficial appearances, without making thorough examination. He keeps the stolen box in his possession, till it is there found, without thinking of looking on the bottom, where the evidences of ownership are distinctly written. (a)

Lastly, supposing greater coolness and circumspection to be observed in the criminal act, the same circumstance of omission may be ascribed to an excess of *confidence*, on the part of the offender, in his own intended after-conduct, and in his purpose and plan of *subsequent* destruction or concealment of the evidence of guilt, or of the concealment of his own person, or final escape from danger by flight.

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- Terminer, January, 1842. The same circumstance of a self-imposed necessity constitutes an answer to an argument founded on the same view of folly in the party concerned, which was advanced, after the trial, in behalf of the prisoner in *Donellan's* case. In that case, the prisoner not only attempted to conceal the physical evidences of the crime, (the traces of a supposed poison in a medical draught,) but actually succeeded in destroying them altogether. See *ante*, pp. 606, 607. But this was done in the presence of *another* person, who endeavored to prevent it; and thus became the means of creating, upon principles of reasonable construction, evidence of a very strong character against him; so strong, indeed, as to induce the argument that if he was really guilty, he must have been *insane* to have acted thus. See *Celebrated Trials*, 178. But, as the case stood, it was his only alternative. He would have been more insane to have left the evidence untouched, as discovery would then have been inevitable. The apothecary who had been sent for, would have detected the poisonous ingredient at once, and this would have led to a course of examination far different from that which took place, and with a more certainly adverse result.

(a) See *The People v. Teal*, *supra*, p. 678.

All such explanations, however, fail to take from these acts of omission their character of intrinsic and manifest folly. But it is in those cases where the criminal, having effectually perpetrated the crime and *escaped discovery*, deliberately creates with his own hand the strongest evidence of it, and puts it, as it were, upon record, that this feature of folly is found to reach the height of absolute infatuation, having almost the quality of mental imbecility, though without any of its exculpatory claims or consequences. (a)

The folly, therefore, (even to a glaring degree,) of particular acts on the part of a person accused of crime, is by no means an unanswerable proof of their not having been committed by him, or, if committed, of having been the result of irresponsible agency. They are parts of a condition of human action, which seems to have been divinely appointed, as a most effectual instrument in a system of self-retribution; and without which, crimes of the most aggravated enormity would constantly and forever escape and defy discovery.

But in a wider range of observation, looking at crime in *general*, as a course of conduct prompted by certain motives, and persisted in, in the hope of attaining certain ends, its intrinsic folly, under any circumstances, becomes apparent.

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(a) If the conduct of *Fauntleroy*, (*ante*, p. 671,) admits of any explanation, it may be this. It was a peculiar feature of the offence in his case, that it was instigated by both the two leading motives which impel or induce to the commission of crime,—the desire of unlawful gain, and the gratification of a revengeful spirit. It was malice, in union with a feeling of self-complacence in view of an artifice successfully practiced, which seems to have dictated the extraordinary record made by the accused, in all its particularity of names and amounts. And it would appear as though these emotions had been too powerful to rest satisfied with the bare mental remembrance and contemplation of the fraud; demanding to be expressed in a form palpable to the bodily sense, even at the risk of encountering the dreadful penalty which was finally undergone. The record was, of course, intended for no eyes but the writer's own; the purpose, doubtless, being to destroy it on the least suspicion of danger. But the action of the law was too sudden to permit this after-expedient to be resorted to.



In yielding to the force of temptation, (the real essence of most forms of guilt,) and voluntarily encountering the hazard of consequences far outweighing the gain proposed ; in entering on a path purposely obscured, and most literally crooked and tortuous, where the end can never be seen from the beginning, and trusting himself and all his interests to the issues of events which he can never wholly control, the criminal constantly manifests the most egregious folly. And such is often his own declared estimate of himself, the moment after the criminal impulse is satisfied, and he has time to reflect on what *has been done*, and what is *to be done*. And perhaps the bitterest and most intolerable ingredient of remorse, when, after all his arts have been exhausted in attempts to conceal his guilt, he finds himself detected and condemned, is the same abiding consciousness of his own folly.

The criminal practice of the old Roman law furnishes an illustration which may be used as a fitting conclusion to the present course of remark. In capital cases, when the jury condemned the accused, instead of using the direct language of our own time and system, and pronouncing him " guilty " of the crime charged, they adopted an indirect form of expression, and disguised the dreadful announcement under one of those euphemisms in which their language abounded :—" *Parum cavisse videtur*," said they : (a) " He seems to have been incautious ; " " We think he has not been sufficiently upon his guard." Want of due *caution* most comprehensively and forcibly expresses the sum of the whole conduct of a condemned criminal, from its earliest instigating impulse to its fatal result. Caution might perhaps, have led him to escape detection and its penalty ; but truer and wiser caution would have enabled him to escape the crime.

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(a) Festus, 825; quoted in 4 Bl. Com. 362, note.

## SECTION VI.

*Proof of a Corpus Delicti.*

In most of the preceding illustrations of the nature and use of circumstantial evidence, the existence of a *corpus delicti*, or the substantial fact of a crime having been committed, has, for the sake of greater convenience, been assumed. In order to cover the whole field occupied by the subject, it is now proposed to return to this fundamental fact, for the purpose of more minute consideration.

A *corpus delicti* may be considered as always made up of two constituent parts; first, certain general facts, forming its basis, exclusive of criminative indications of any kind; as, in a case of alleged homicide, the *fact of death*, (involving the physical fact of the existence of a dead body, and its identification, when possible;) and secondly, certain other facts showing the existence of *criminal agency* as the cause of the former. (a)

The first of these constituents of a *corpus delicti* is well expressed by the term "*corpus*," in its primary sense of a material substance or subject, (b) and is always required to be proved either by direct testimony or by presumptive evidence of the strongest kind. (c) The latter, in which the term *corpus* takes the secondary sense of a substantial fundamental fact, becomes a proper subject of presumptive reasoning upon all the circumstances of the case, including, sometimes, those which are employed in the next stage of investigation, namely, in the process of fixing the crime upon the accused. (d)

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(a) Best on Pres. § 202, p. 271.

(b) See *ante*, p. 119, note (b).

(c) Best on Pres. *ubi supra*.

(d) *Id.* § 205, pp. 274, 275.

The mode of proving a *corpus delicti*, or the quantity of evidence requisite to establish that preliminary fact, will now be considered under the following heads.

### I. *Corpus Delicti in Homicide.*

In cases of alleged homicide, the proof of a *corpus delicti* involves that of the following points or general facts; first, the fact of death, particularly as shown by the discovery of the dead body or its remains; secondly, the identification of such body or remains as those of the person charged to have been killed; and, thirdly, the criminal agency of another, as the cause of the death.

#### 1. *The fact of Death.*

This is the basis of the *corpus delicti*; and the circumstance which furnishes the best proof of it, as well as the most effectual means of ascertaining its cause, is the finding and inspection of the dead body itself. (a) Hence it is a general rule of evidence that a dead body must have been discovered and seen, so that its existence and identity can be testified to by eye-witnesses. (b) It is considered unwarrantable and dangerous to *infer* the fact of the death of a person from the circumstance of his sudden and unaccountable disappearance, even when followed by long continued absence, and even although such circumstances may be connected with others apparently casting suspicion upon a particular individual. Some early cases of mistaken convictions founded on such inferences, sufficiently establish the sound policy of this rule, (c) which, so far as its authority is concerned, rests essentially upon the declaration of Sir *Matthew Hale*, that he would never convict any person of

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(a) Wills, Circ. Evid. 162.

(b) In the language of the civilians, *de corpore interfecti necesse est ut constet*. Matth. de Probat. c. 1, n. 4, p. 9.

(c) Best on Pres. § 202, p. 272.

murder or manslaughter, "unless the fact was proved to be done, or at least the body found." (a)

But to require the discovery of the body in all cases, would not only be unreasonable and absurd in itself, but would seriously interfere with the course of criminal justice. Mr. *Bentham*, regarding the rule in this unqualified light, pronounced it to be in the highest degree prejudicial to justice. "To secure to himself impunity," he observes, "a murderer would have no more to do but to consume or decompose the body by fire, by lime, or by any other of the well known chemical menstrua, or to sink it in an unfathomable part of the sea. In any of these ways, might the body be effectually got rid of." (b) And in the case of *The United States v. Gibert, et al.* (c) Mr. Justice *Story*, in summing up the case at the trial, said of the same rule or proposition, that "it certainly cannot be admitted as correct in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment who may be guilty of the most flagitious crimes. In the cases of murders committed on the high seas, the body is rarely if ever found; and a more complete encouragement and protection for the worst offences of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas." (d)

It follows, therefore, that, in cases where the discovery of the body, after the crime, is impossible, the fact of death may be proved by other means. Indeed, the rule, as stated by

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(a) 2 Hale's P. C. 290.

(b) 3 Jud. Evid. 284. The truth of this remark has been proved by several cases of attempted destruction by some of the means here mentioned, which have occurred since it was written, among which are some of recent date. See the cases of *Rex v. Cook*, Leicester Summer Assizes, 1834; case in the Central Criminal Court, May, 1842, Wills, Circ. Ev. 165; and the case of *Commonwealth v. Webster*, in 1849.

(c) 2 Sumner, 19, 27.

(d) See also 2 Stark. Evid. 944.

Lord *Hale* himself, is in the alternative,—the fact must be proved to have been done, *or* the body found. (a) The question then occurs, by which kind of evidence,—direct or indirect,—must the fact of death be established. The language of Lord *Hale* indicates the former. But, according to the rule as it seems to be understood by the best modern writers, the fact of death, where the body cannot be found, may be proved by circumstances. “It may be *inferred*,” says Mr. *Wills*, “from such strong and unequivocal circumstances of presumption as render it morally certain, and leave no ground for reasonable doubt.” (b) In illustration of this, the same author cites the case of *Rex v. Hindmarsh*, (c) in which the prisoner, who was a seaman on board a vessel, was charged with the murder of his captain. It appeared in evidence, in that case, that while the ship was lying off the coast of Africa, where there were several other vessels near, the prisoner was seen, one night, to take the captain up in his arms, and throw him into the sea, after which, he was never seen or heard of; but that, near the place on the deck where the captain was seen, was found a billet of wood, and the deck and part of the prisoner’s dress were stained with blood. On this, it was objected by the prisoner’s counsel, on the authority of Lord *Hale*, and a case before *Gould*, J. that the *corpus delicti* was not proved, as the captain might have been taken up by some of the neighboring vessels. But the court, while admitting the general rule on the subject, left it to the jury to say whether the deceased was not killed before his body was cast into the sea. And the jury having found in the affirmative, the prisoner was convicted; which conviction was, on a case reserved, held good by all the judges. (d)

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(a) *Supra*, p. 679.

(b) *Wills*, Circ. Evid. 162. See also *Best on Pres.* § 202, p. 271.

(c) 2 *Leach*, C. C. 569.

(d) *Best on Pres.* § 203.

## 2. *Identification of the body or its remains.*

Supposing a dead body, or its remains, to have been discovered, the next step in the proof of a *corpus delicti* is the identification of such body or remains, as those of the person charged to have been slain.

Where the body is found shortly after the commission of the crime, and the face has not been disfigured by the violence employed, or by accident, or in the natural course of decay, the identification is made in the form of direct and positive proof of the fact by those to whom the deceased was known. But where the features have been destroyed, the body may be identified by circumstances, as by the dress, articles found on the person, and by natural marks upon the person. In *Colt's* case, (*a*) where a considerable portion of the face had been beaten in by blows, and the progress of decay had otherwise rendered direct recognition impossible, the body was identified in this way. In *McCann's* case, (*b*) where the face of the deceased had been eaten away by hogs, identification was effected in a similar manner. Even where nothing but the skeleton has been found, it may sometimes be identified by peculiar marks, and by objects discovered near it. In the case of *Rex v. Clewes*, (*c*) the body of a man was, after a lapse of twenty-three years, identified by his widow from some peculiarity about the teeth, and by a carpenter's rule and a pair of shoes found with the remains and also identified. But in examining skeletons, great attention should be paid to their anatomical characteristics, upon which the important facts of the age and sex of the person depend; as these may be decisive of the whole case in favor of the accused. (*d*)

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(*a*) New York Oyer & Terminer, January, 1842.

(*b*) 13 Smedes & Marshall, 472, 478.

(*c*) 4 Carr. & P. 221.

(*d*) See 2 Beck's Med. Jur. 28—36. The bones of an animal have sometimes been mistaken for those of a human being. See the case of the *State v. Boorns*, *ante*, p. 579, note (*c*).

Where the body has been purposely mutilated, and especially where it has been dismembered, with a view to its destruction by fire or otherwise, its identification becomes a matter of greater difficulty; the head being usually destroyed first, for the very purpose of preventing recognition. But it occasionally happens that even the agency of fire, which is generally selected as the readiest and most effectual means of destruction, proves inadequate to the purpose contemplated. In *Webster's* case, the head of the deceased had been placed in a furnace and exposed to a strong heat for a considerable time. But some blocks of mineral teeth resisted the action of the fire so effectually, that they were identified by a dentist as parts of a set of artificial teeth which he had made for the deceased, and which the latter wore at the time he disappeared. (a) Some other portions of the body, which had not been subjected to the action of fire, were also identified by peculiar appearances. (b) A case is mentioned by Mr. *Wills*, in which the remains of a female, consisting merely of the trunk of the body, from which the other parts had been cut, were identified by a curious train of circumstantial evidence, embracing several facts of conduct on the part of the prisoner. (c)

### 3. Criminal agency, as the cause of Death.

A dead body, (d) or its remains, having been discovered and identified as that of the person charged to have been slain, and the basis of a *corpus delicti* being thus fully estab-

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(a) Bemis' Report, 80, 84, 85, 87. Dr. *Beck* mentions an English case in which the point of identity was determined by the teeth. 2 Beck's Med. Jur. 86.

(b) Bemis' Report, 70, 71, 89.

(c) *Wills*, Circ. Evid. 165. See also *Greenacre's* case, *Id.* 171.

(d) Where persons are found not dead, but in a dying condition, or with fatal injuries from which death results, the process of proof is much facilitated; identification being readily effected, and the declarations of the injured person himself furnishing important and sometimes decisive evidence, not only as to the general fact of crime, but also as to the particular perpetrator.

lished, the next step in the process, and the one which serves to complete the proof of that indispensable preliminary fact, is to show that the death has been occasioned by the criminal act or agency of *another person*. This may always be done by means of circumstantial evidence, including that of the presumptive kind; and, for this purpose, a much wider range of inquiry is allowed than in regard to the fundamental fact of death; and all the circumstances of the case, including facts of conduct on the part of the accused, may be taken into consideration. (a)

Prominent among the testimony necessarily made use of at this stage of investigation, is that of the *medical* and *scientific* persons,—surgeons, physicians and chemists,—by whom the body or its remains have been inspected and examined, either at the time of their discovery or shortly after. The testimony of these witnesses, as to the appearances observed on such examinations, is always of the greatest value, owing to the care, skill and precision with which they are usually conducted. And their opinions as to the causes of such appearances are often entitled to much consideration, and are of material service in correcting impressions derived by unprofessional persons from the mere exterior of the subjects observed.

The subject of the present section belongs properly to the extensive department of *medical jurisprudence*, and may be found discussed with great minuteness in the various works which have been professedly devoted to the illustration of that important branch of science. (b) All that is now proposed, or indeed practicable, is to present a mere outline of the course of inquiry, and the principal results attainable by it.

It has been well remarked that the inference of violence

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(a) Best on Pres. § 205. Wills, Circ. Evid. 168.

(b) Among these, the works of Drs. *Beck* and *Taylor*, and the very recent work by *Wharton* and *Stillé* may be mentioned as the principal authorities for what is advanced in the text.



as the cause of death, is not to be hastily drawn from mere external appearances, however impressive and apparently decisive they may seem. (a) Accident and suicide are among the daily causes of death, and they are often accompanied by appearances not readily distinguishable from those which attend death by actual violence. The suppositions of accident and suicide, as well as the operation of natural causes, are therefore possibilities which must be taken into view in every case, and satisfactorily excluded, before the conclusion of criminal violence as the cause of death is to be adopted as probable. (b)

As aids to inquiry and means of arriving at the truth on the question as to the *cause* of a known death, the following circumstances are always of the greatest importance.

(1.) The location, *disposition* and *state* of the body, as found. This sometimes serves to negative at once the suppositions of accident, disease or suicide, as the cause of death. Where the body has been found *buried* in a rude and hurried manner, as by being thrust into a mere hole in the ground, (c) especially if doubled up, or otherwise distorted to facilitate the purpose, (d) or imperfectly covered with earth, stones or other substances, (e) or merely dragged into a thicket, (f) or crowded into a box and nailed up; (g) or sunk with stones in a pond, (h) and particularly where it has been attempted to be mutilated or actually dismembered and partially consumed by fire: (i)—these circumstances show, on their face, and of necessity, the agency of another

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(a) See 2 Beck's Med. Jur. 3, 4.

(b) Best on Pres. § 205. Wills, Circ. Evid. 168.

(c) *The State v. Robinson*, Middlesex (N. J.) Oyer & Terminer, March, 1841.

(d) *Drayne's case*, 5 London Legal Obs. 128.

(e) *Adam's case*, 11 *Id.* 415.

(f) *The State v. McCann*, 18 Smedes & Marshall, 471, 473.

(g) *The People v. Colt*, New York Oyer & Terminer, January, 1842.

(h) *Rex v. Thurtell & Hunt*, Celebrated Trials, 7.

(i) *Commonwealth v. Webster*, Bemis' Report.

person in its disposition, while they give to the fact of death itself the character of an event *requiring concealment*, and subject, therefore, at the outset, to an unfavorable interpretation.

(2.) The *locality* where the body is found; (*a*) as whether in the open air, or in, or under or near a building. If in the open air, whether in or near a road or path; if in a building, in what part, and whether on a bed or on the floor, or the like.

(3.) The *position* and attitude of the body, as found; as whether in a sitting or lying posture, and whether lying on the back, face or side, including the disposition of the limbs. (*b*) And the position of the body should be considered not only in itself, but in its relation to surrounding or contiguous objects. (*c*) This circumstance is of peculiar importance when taken in connection with visible marks of violence on the body, and the presence of a weapon competent to have inflicted them. (*d*) And it is strongly urged by medical writers that no change whatever should be made, in this particular, when the body is first found; but that it should be first viewed, if possible, exactly in the position in which it was first discovered. (*e*) The circumstance that the body was found *tied* goes also to negative the suppositions of accident and suicide as the cause of death, although it is not to be regarded as uniformly conclusive; since there have been cases where a party intending suicide has attempted in this way to relieve his memory from the disgrace of the act. This, however, is very difficult to effect, and the disguise is readily penetrated. (*f*)

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(*a*) Wharton & Stillé's Med. Jur. 555, § 817.

(*b*) 2 Beck's Med. Jur. 5, 106. Taylor's Med. Jur. 197, 198. (Phil. ed. 1858.)

(*c*) Wharton & Stillé's Med. Jur. 555, § 817.

(*d*) *Id.* § 819.

(*e*) *Id.* § 817. 2 Beck's Med. Jur. 5. See the reason given, *Id. ibid.*

(*f*) Wharton & Stillé's Med. Jur. 756, § 1152.

(4.) The expression of the *countenance*. (*a*) In cases of suicide, death being desired and determined on, there is no expression of fear upon the countenance, though it may be haggard from the influence of other passions; the eyes being usually closed or sunken. (*b*) In cases of assassination, on the contrary, where death is struggled against and shrunk from, there is always a degree of fear, amounting sometimes to the extremity of terror, imprinted on the visage, (*c*) the eyes being open or staring. The countenance, in these cases, is also usually pale; (*d*) although sometimes there may be the opposite appearance of redness or suffusion. The latter circumstance is considered important, as it may indicate the use of violence in order to stop the cries of the subject of the crime. (*e*)

(5.) The state of the *clothing*. (*f*) If torn, cut or otherwise disordered, or stripped off in apparent haste, or attempted to be put on again in an unusual manner, or if the pockets are found rifled, or the like, it goes to indicate a violent death. Stains of blood or other substances and marks of incisions or perforation near the wounds, or corresponding with them in size, shape and direction, serve a similar purpose, and require to be accurately observed. (*g*)

(6.) The condition of the *ground* in the immediate vicinity of the body, where it is found in the open air, as disturbed in any manner, or bearing impressions of any kind. (*h*) Marks of struggling and of dragging the body indicate the violent agency of another as the cause of death. (*i*) Footprints conclusively show the presence of others, and their

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(*a*) 2 Beck's Med. Jur. 106.

(*b*) *Id.* 118.

(*c*) *Id. ibid.*

(*d*) *Id. ibid.*

(*e*) *Id.* 106.

(*f*) *Id.* 5, 106. Wharton & Stillé's Med. Jur. § 1154.

(*g*) 1 Taylor's Med. Jur. 188.

(*h*) 2 Beck's Med. Jur. 5.

(*i*) *Id. ibid.* *The State v McCann*, 18 Smedes & Marshall, 478.

number, character and direction are always to be carefully attended to. (a) The prints of horses' hoofs belong to the same head. (b) Bloody appearances on the ground, whether in spots or tracks, and whether in one or more places, are circumstances of the first importance. (c) If little or no blood is found where the body lies, but large quantities at some distance, and especially if concealed or attempted to be concealed, it strongly indicates the agency of another.

(7.) The condition of the building or apartment in which the body is found. Marks of struggling with an assailant are indicated by the disordered and broken state of the furniture. Marks of a violent entry will be apparent on doors or windows. The quantity of blood on the floor or walls, the position and direction of pools or streams of blood, (d) and its distribution in minute spots over large surfaces, often serve to indicate how death has been inflicted. Marks of the concealment of blood by washing, painting over or planing out, are highly criminative. (e)

(8.) *Weapons*, or other means of taking life, whether found in immediate contact with the body, or in its vicinity. (f) The minutest circumstances connected with objects of this kind require close attention and examination; such as the distance at which the weapon is found, the

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(a) 2 Beck's Med. Jur. 5, 148. Wharton & Stillé's Med. Jur. 760, § 1159.

(b) In a case which occurred in New Jersey, in 1820, it appeared that the defendant, who was charged with arson, had turned his horse's shoes round, after arriving at the house he fired, so that there should appear to be *two* persons proceeding *to*, and none *from* it. This very artifice however was the means of his detection, since the reversal of the shoes, as indicated by the recent marks of the nails on the horse's feet, afforded one of the most emphatic of the indications by which the defendant's guilt was determined. Whart. & Stillé's M. J. 760, § 1159.

(c) 2 Beck's Med. Jur. 107.

(d) Case of *Mary Norkott* and others, 14 State Trials, 1824. As to the examination of supposed blood-stains by chemical tests, see Taylor's Med. Jur. 214.

(e) See *ante*, p. 412.

(f) 2 Beck's Med. Jur. 5. Taylor's Med. Jur. 197.

direction in which it lies, and its relative position to the body; its condition, whether bloody or otherwise, and whether sheathed or closed. (a) If poison, the state of the phial containing or having contained it, whether corked or otherwise. The absence of all weapons or means of destroying life serves to negative the suppositions of accidental or suicidal death. (b)

(9.) Other objects found near the body, indicative of the presence of another person. (c)

(10.) Appearances of the *body itself*, as bearing marks of violence; such as wounds produced by blows, cuts, stabs or shots; bruises, stripes, burns, ligatures or the pressure of the hands; accompanied by effusion of blood, whether external or internal, or both. These may be most conveniently considered under separate heads.

*Wounds* upon the body viewed may be considered under the classification of contused and lacerated wounds, incised and punctured wounds, and gun-shot wounds. (d)

*Contused* wounds, being usually produced by the application of considerable force to the body, are often accompanied by fractures of the bones adjoining the seat of injury. They are also sometimes connected with visible separation and laceration of the skin and flesh, and more or less effusion of blood. In other instances, they present merely a discolored appearance, the principal injuries being under the skin. The most fatal wounds of this class are ordinarily those which are received upon the head, but they occasionally occur on the trunk, and they may be the result of accident or suicidal design, as well as the criminal agency of another. Thus, they may be produced by the deceased

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(a) See further, *post*.

(b) Tayl. Med. Jur. 199, and see *post*.

(c) See *ante*, pp. 271, 642.

(d) Whart. & Stillé's Med. Jur. 548, 550. For the definition of the term "wound," see *Id.* 589, § 792. Tayl. Med. Jur. 169. 2 Beck's Med. Jur. 106, 287.

having fallen against some hard substance, or from a height, or by a hard or heavy body having fallen upon him, or passed over him, or by sudden contact with a body in motion ; or they may be intentionally produced by voluntary contact with hard substances, as by dashing the head against a wall, or leaping from a height ; or they may be caused by a kick or blow from a horse or other animal, or by a blow of the fist of another person ; or, finally, by a weapon, such as a stone, club or hammer in the hands of another, or even, (though very rarely) in the hands of the deceased himself.

To which of these causes to assign the production of the wound or wounds observed on the body, and, in particular, to determine whether a contused wound has resulted from the use of a weapon, or the blow of a fist, or an accidental fall against a hard substance, is often a matter of considerable difficulty to a medical examiner and witness. (*a*) In some cases, it may happen that a wound has been the result of a combination of causes ; as where a person has been knocked down with a stick or fist, and, in falling, has struck his head against a stone.

Important light may be thrown on these inquiries by the appearance of the wounds themselves, their situation, nature, extent, number, depth, shape and other characteristics. If there be contused wounds on several parts of the head, with copious effusion of blood beneath the skin, the presumption will be that a weapon must have been used. If the marks of violence be on the vertex, it is also highly probable that they have been caused by a weapon, since this is not commonly a part which can be injured by a fall. (*b*) And the depth and nature of the wound may be such that no accidental fall will reasonably account for its production. (*c*)

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(*a*) Taylor's Med. Jur. 187. Wharton & Stillé's Med. Jur. 549, § 809. 2 Beck's Med. Jur. 108.

(*b*) Taylor's Med. Jur. 187.

(*c*) *Id. ibid.*

The presence of an object near the body, whether animate or inanimate, capable of producing the wounds observed, may also serve to aid in determining their cause; as where the body is found prostrate near a vicious horse, and it appears that the wounds may have been made by a kick from that animal. (*a*) But the circumstance to which most importance is usually attached, in these cases, is the presence of one or more *weapons*, or other detached, mechanical means of death, either in actual contact with the body, or in its immediate vicinity. This goes to repel the supposition of accident. It also, in general, serves to negative the supposition of suicide, which is rarely committed with weapons productive of contused wounds. (*b*)

The adaptation of an instrument or object found near a dead body, to have produced contused and lacerated wounds observed upon it, is sometimes ascertained by comparing its surface, edges or projecting parts, with the shape and size of the wounds themselves. And the fact that it has actually been used upon the body will sometimes appear from the

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(*a*) In the case of *Rex v. Booth*, the deceased was found dead in a stable, not far from a vicious mare, with her traces upon his arms and shoulders. But there was also a bloody spade found in the stable, and from this circumstance suspicion fell on the prisoner, who had been on ill terms with the deceased. The question was, whether the deceased had been killed with the spade, or kicked by the mare. The spade having been inadvertently used after the death, there was no means of determining the nature of the cause of death, except by the character of the wounds themselves, which were all on the head. Two surgeons expressed a strong opinion that the wounds could not have been inflicted by kicks from a horse, and gave particular reasons for such opinion. The prisoner was however acquitted. *Wills, Circ. Evid.* 172.

(*b*) Among the exceptional cases is one mentioned by Mr. *Best*, in which a man first attempted to destroy himself by running with his head against a wall; and, not having succeeded in this attempt, he struck himself repeatedly on the forehead, with a cleaver, producing wounds from which death soon followed. *Best on Pres.* § 205. See also, a case recorded by Mr. *Turleton*, and mentioned in *Taylor's Med. Jur.* 191. A woman, in Philadelphia, lately endeavored to destroy herself by placing her head upon a block, and dealing upon the back part of it numerous severe blows with a hatchet. *Wharton & Stille's Med. Jur.* 554, § 816.

circumstances of blood, hair and other substances adhering to it. In other cases, greater difficulty is experienced in pronouncing an opinion as to the kind of weapon employed ; and opinions as to the use of an instrument or weapon found near a body, or in the same house with it, have sometimes proved erroneous. In the case of *Thorn*, who was convicted of murder in Maine, in 1843, the wound, which was upon the head of the deceased, was pronounced by one of the surgeons who examined the body, to have been inflicted with the bow of a pair of iron tongs belonging to the house ; and, by two other surgeons, to have been caused by some blunt instrument, a brick-bat, or something similar. But the criminal himself confessed, after his conviction, that the blow had been inflicted with an axe. (a) In *Coll's* case, there was much inquiry and discussion as to the cause of a peculiar perforation found on the skull of the deceased, and the nature of the weapon by which it might have been made. It was supposed that it might have been produced by a ball projected from an air-gun, or from a pistol by the mere explosion of a percussion cap ; (b) and several experiments were performed with a pistol, thus prepared, in open court, with a view to the determination of the possibility of such a circumstance. But, according to the prisoner's confession, as made on the trial, all the wounds were made with a hatchet ; and this was the final conclusion of the medical witnesses themselves. So, in *Webster's* case, it was supposed that a sledge-hammer found in one of the prisoner's rooms, might have been used to inflict the mortal blow, and it was so actually charged in one of the counts of the indictment. But, according to the prisoner's confession, he killed the deceased by a single blow inflicted with the stump of a grape-vine, which happened to be within his

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(a) Law Reporter, vol. 6, pp. 52, 94. 2 Beck's Med. Jur. 117, note.

(b) The supposition was expressed in this form, in order to account for the fact that nothing like the report of the discharge of an ordinary loaded fire-arm was heard at the time of the supposed death.



reach, and which he soon afterwards destroyed by putting it into the fire. (a)

The presence of wounds of other descriptions, upon the body, such as incised and gun-shot wounds, frequently serves to negative the supposition of accident, and also of suicide; though not always conclusively in regard to the latter. (b) It has sometimes happened that the murderer, after dispatching his victim by shots or stabs, has thrown him down a precipice, in order to produce an appearance of accidental death. (c)

Where a body has been found dead at the foot of a height, with contused wounds and fractures only, such as usually accompany injuries of that kind, the presumption is that they were produced by the fall. (d) But whether the fall itself was an accidental or suicidal act, or produced by the agency of another person, and whether such agency were accidental or intentional, must, of course be determined by accompanying circumstances. If the hands of the corpse are found clenched, and containing earth, grass or other substances, torn from the brink or side of a precipice, or bank of a stream, it serves to negative the supposition of suicide, by showing a violent effort to escape the fatal peril. (e)

The mere situation of a contused wound will sometimes effectually expose the falsity of the defence that it was accidental, which is sometimes set up in cases of homicide. (f)

In the New York case of *The People v. Graham*, (g)

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(a) Bemis' Report, 566—568.

(b) See further, on this head, *post*.

(c) See a French case quoted by Dr. Beck. 2 Beck's Med. Jur. 117, 118.

(d) See *Id.* 116.

(e) See *Id.* 5, note.

(f) Taylor's Med. Jur. 190, 192, 196. Wharton & Stille's Med. Jur. 549, § 809. See *Greenacre's case*, Wills, Circ. Evid. 171.

(g) Before Mr. Justice Spencer, Delaware (N. Y.) Oyer & Terminer, July 1818; Clark's Report.

where the prisoner was indicted for murdering two persons, the defence set up by him was the singular one that the deceased had fought with and *killed each other*. The impossibility of this fact was at once shown by the nature of the wounds which the bodies presented, the heads of both being literally split open ; and by the discovery, in a brush heap, where it had been thrown for concealment, of a stick or club, covered with blood, hair and brains. (a)

*Incised* and *punctured* wounds comprise what are called in ordinary language, cuts and stabs ; and from their appearance and nature, indicate at once that they must have been produced by weapons, or by objects having sharp cutting edges or points. (b) They are referable to the same three descriptions of causes as other wounds : namely, to accident and suicidal design, as well as to a homicidal attack upon the person by another.

Cuts or incisions upon the body may happen accidentally, in consequence of falling against or upon glass, crockery or other similar substances, and such injuries have occasionally been followed by fatal results. But wounds made in this way are characterized by their great irregularity, and the unevenness of their edges. (c) Severe incisions on vital parts do not often happen by accident ; (d) and the question therefore, which most frequently arises for determination, is whether the wound was inflicted by the deceased himself, or by another person.

The part of the body in which a single mortal wound of this class is most commonly found to be inflicted, is the

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(a) *Id.* pp. 4, 5.

(b) Taylor's Med. Jur. 185.

(c) *Id.* 186.

(d) *Id.* 198. A possible case of this kind is mentioned in Fleta ; as where a barber, while in the act of shaving a person, has his hand violently struck by another, from mere accident, causing him to cut the person's throat ; (*cum quis, ludens cum pila, manum barbitonsoris percutierit, quod non viderit, ob quod gulam barbatæ præciderit.*) Fleta, lib. 1, c. 81.

*throat*; that being the part in which such a wound may be made most quickly, and with the surest effect. Incised wounds of the throat are sometimes set down as presumptive of suicide; (a) but there are many instances on record, of murders committed in this way, and there is little doubt that murderers sometimes wound the throat for the more effectual concealment of the crime. (b)

A homicidal wound in the throat is often indicated by its *extent*, the whole neck being divided to the vertebræ; and it has sometimes been supposed that such a wound is incompatible with the supposition of self-destruction. (c) But there have been cases indicating the reverse. (d) Great *irregularity* in the wound, so far as it may be referred to a struggle against violence, is a circumstance indicative of homicide; (e) but it may be present also in cases of suicide, arising from agitation or ignorance on the part of the subject. But a more important circumstance than either of these is the *direction* of the wound, or the manner in which it is found to be made; and it has been considered by some to afford presumptive evidence sufficiently strong to guide a medical jurist in the inquiry. (f) It has been remarked that, in most suicidal wounds which affect the throat, the direction of the cut is commonly from left to right, either transversely, or passing obliquely from above downwards. In the case of left-handed persons, the direction would, of course, be precisely the reverse. (g) A homicidal incision is, on the other hand, made from right to left, unless the murderer be left-handed, in which case the direction would be the same as in cases of suicide; and it will be the same

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(a) Taylor's Med. Jur. 192.

(b) *Id. ibid.*

(c) *Id. ibid.*

(d) *Id. ibid.*

(e) *Id. ibid.*

(f) *Id. ibid.* But see Wharton & Stillé's Med. Jur. 555, § 817.

(g) Taylor's Med. Jur. 192.

if the wound is inflicted from behind. (a) It is observed also, that self-murderers usually make the incision immediately under the chin. (b)

The shape and direction of the wound and the manner in which it has been made, while serving to negative the supposition of suicide, have sometimes operated to the identification and detection of the particular criminal. In a case in England, where the body of a farmer was found dead on a high road, with the throat severely cut, the wound was found to have been made, not, as is usual in suicides, by carrying the cutting instrument from before backwards, but as the throats of sheep are cut, when slaughtered by a butcher. The knife had been passed in deeply under and behind the ear, and had been brought out by a semicircular sweep in front; all the great vessels of the neck, with the œsophagus and trachea, having been divided *from behind forwards*. The prisoner, who was proved to have been a butcher, was subsequently tried and executed for the crime. (c)

The *number* of the wounds observed is also an important circumstance. In suicides, commonly one wound only is seen, namely, that which has destroyed life. But murderers also have been known to dispatch their victim by a single wound. The marks of several wounds or attempts around the principal wound have been considered to furnish presumptive evidence of murder: but a suicide also may inflict many wounds, or leave the marks of several attempts, before he succeeds in his purpose. (d) But recent wounds on the back of one or both hands, when found in persons who have died from wounds in the throat, are strongly presumptive of homicide. (e)

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(a) Taylor's Med. Jur. 193.

(b) 2 Beck's Med. Jur. 135.

(c) Taylor's Med. Jur. 191.

(d) *Id.* 194. See 2 Beck's Med. Jur. 131, note; *Id.* 135, note.

(e) Taylor's Med. Jur. 201.

If no weapon by which the wound could have been made be found, or if it be found concealed in a distant place, it is a circumstance strongly indicative of homicide, provided the wound be of such a nature as to have proved speedily fatal. (a) If a weapon be found near the body, or within a short distance from it, its nature and the degree of its sharpness, as corresponding with the appearance of the wound, are important considerations. Its appearance, also, and relative position to the body, (that is, as lying on the right or left side of it,) require to be most accurately examined and considered, as the appearances of suicide are sometimes attempted to be given to murder, by the perpetrator, in order to escape suspicion and discovery. The instrument with which a suicidal wound of the throat is most commonly made is a razor, and it is frequently found either grasped in the hand or lying by the side of the deceased. Where the wound must have produced almost instant death, if the razor is found *closed*, there is fair ground to suspect the interference of another person ; (b) although this circumstance also has happened in cases of suicide. (c) If the instrument be found still firmly grasped in the hand of the deceased, no better circumstantial evidence of suicide can perhaps be offered ; it being considered impossible that any murderer could imitate such a state and position. (d) But where the razor is held loosely in the hand, or with no compression of the fingers upon it, there is room for the supposition of homicide, which may become strong presumption, especially if no blood appear upon the hand. (e)

The relative position of the instrument to the body has

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(a) Taylor's Med. Jur. 199.

(b) *Id. ibid.*

(c) Wharton & Stillé's Med. Jur. 556, § 819.

(d) Taylor's Med. Jur. 199. See the medical reason, *ibid.*

(e) *Id. ibid.*

already been mentioned as an important circumstance, and so is the particular manner in which it is disposed. If a knife be found with its point stuck into the floor, at some distance from the body, and pointing towards it, with the handle from it, it is reasonably indicative of homicide. (a)

The position in which the body is found is also a material circumstance. This may be such a position as the deceased could not have assumed, on the supposition of the wound being accidental or suicidal. (b) The position in which the body was when the wound was inflicted, is a frequent question on coroners' inquests and criminal trials. (c) It is remarked that few suicides cut the throat while in a recumbent posture. (d) Where the body is found in bed, the manner in which it is covered may serve to indicate a homicide; as where the bed-clothes are not at all disturbed, (e) or where the face is covered with a cloth or towel. (f)

Cuts in the clothing sometimes serve to indicate the cause of the death. If the deceased has been wounded with his clothes on, and, together with the wound in the throat, the cravat and shirt or part of the dress is found cut through, this is said, (all other circumstances being equal,) to be presumptive of homicide: for it is not usual for suicides, unless laboring under confirmed insanity, to allow any mechanical obstacles of this kind to remain in the way of a weapon. (g)

Marks of blood in the apartment where the body is found, and upon the body itself, are among the most important indicatory circumstances. If blood is found in seve-

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(a) Case of *Mary Norkott* and others, 14 State Trials, 1824.

(b) Taylor's Med. Jur. 198.

(c) *Id.* 201.

(d) *Id. ibid.*

(e) Case of *Mary Norkott* and others, *ubi supra*.

(f) *Regina v. Courvoisier*, June, 1840.

(g) Taylor's Med. Jur. 201.

ral places, it is material to observe in what places the effusion has been largest, and the direction of the streams. (a) If the wound be in the throat, it should be observed whether blood has flowed down in front of the clothes or person; for this will sometimes show whether the wound was inflicted when the individual was standing, lying or sitting down. (b)

*Stabs* or punctured wounds come next to be considered. Suicidal wounds of this character usually occur in the chest, but sometimes in the abdomen and neck. (c) Their direction is commonly from right to left, and from above downwards. In left-handed persons, the direction is of course the reverse. (d) A homicidal stab may take the same direction as one which is suicidal; but this could be only in cases where the murderer stood behind or at the side. (e) Perforations of the clothing, corresponding with the situation of the wounds, as showing that the deceased was killed with his clothes on, require to be attentively considered. In suicides, the dress is sometimes drawn aside when the wound is inflicted. (f)

If no weapon adapted to produce the wound be found, it is, as already stated, presumptive of homicide. If a weapon be found near, a comparison of its shape with that of the wound, and its length with the depth of the stab, will serve to determine whether it was the actual means of death. (g) It is no uncommon occurrence for a murderer to substitute some instrument belonging to the deceased or another person, for that which he has employed. (h) It may happen

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(a) Case of the *Norkotts*, *ubi supra*.

(b) Taylor's Med. Jur. 200, 201.

(c) *Id.* 189, 190.

(d) *Id.* 192, 198.

(e) *Id.* 198.

(f) Wharton & Stillé's Med. Jur. 558, § 819.

(g) *Id.* 548. § 808. Taylor's Med. Jur. 185, 198.

(h) *Id. ibid.*

that a wound may be single upon the skin, and yet two or more internal wounds have been made by the same weapon ; as where the weapon has been partly withdrawn, and plunged into the body in another direction, (*a*) or worked about in the wound.

As to the circumstance of the weapon being held in the hand of the deceased, the remarks on the same point under the preceding head may be referred to. (*b*) If the wound must have been instantly fatal, and the weapon is found sheathed, it goes to negative the supposition of suicide. (*c*)

If the weapon be found bloody, particular attention should be given to the manner in which the blood is diffused over it. It is not unusual for criminals to besmear with blood a knife or other weapon which has probably not been used. On the other hand, it sometimes happens that a weapon which has actually been used, is found to be free from any stain of this kind. This is accounted for by the supposition that the weapon, in being withdrawn, is cleanly wiped against the edges of the wound, in the integuments. (*d*)

Stabs differ from cuts in this particular, that they are more frequently produced by accident. Fatal wounds of this character have been known to be produced by the deceased having fallen on some pointed weapon or object carried about him, or even held in his hand. (*e*) It is possible, also, that a person may be injured in this way, by falling upon or running against a weapon held in the hand of another ; and this is sometimes alleged as an excuse for a homicidal injury by stabbing, particularly where there is but one wound found.

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(*a*) Wharton & Stillé's Med. Jur. 548, § 808.

(*b*) *Ante*, p. 696.

(*c*) *Ibid*.

(*d*) Tayl. Med. Jur. 200.

(*e*) *Id*. 198. Dr. Beck mentions a singular case where a wound of this character was produced by a kind of auger, which the deceased carried under his arm. 2 Beck's Med. Jur. 126, 127.



The truth of these defences may sometimes be effectually tested by observing the direction of the wound. (*a*)

*Gun-shot* wounds are of the contused kind, (*b*) but, like cuts and stabs, usually clearly indicate the employment of a weapon. A wound of this character has such peculiarities, that it is not easy to mistake it for any other injury; although perforating wounds of the skull have sometimes closely resembled bullet-wounds. (*c*)

As to the situation of these wounds, it has been observed that those inflicted by suicides are almost always directed to a vital part,—to the heart or to the brain. (*d*) If the latter, the weapon is usually put into the mouth, or applied to the temple. Near wounds of this character forbid the supposition of accident, (*e*) and have sometimes been considered as excluding that of homicide also. (*f*) Suicides rarely apply the weapon to the back of the head. (*g*)

The appearance of a gun-shot wound often serves to indicate very clearly the important fact that the muzzle of the piece, when fired, was placed *near* the surface of the body. In “near” wounds, as these are called, the skin is always found to be blackened or burnt, and the wound wide and lacerated. (*h*) Suicidal wounds almost always exhibit these appearances, and so do accidental wounds from a piece in the hands of the deceased. (*i*) But homicidal wounds also may present the same appearances. (*j*)

The direction of the wound, showing that of the projec-

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(*a*) 2 Beck's M. J. 107, 111, 112. Tayl. M. J. 198. Wharton & Stillé, 554, § 817.

(*b*) Tayl. Med. Jur. 262.

(*c*) *Id.* 262, 263.

(*d*) *Id.* 266.

(*e*) *Id.* 190.

(*f*) Smith's For. Med. 302. But see Tayl. Med. Jur. 189.

(*g*) 2 Beck's Med. Jur. 119.

(*h*) Tayl. Med. Jur. 263, 266.

(*i*) *Id.* 267.

(*j*) *State v. McCann*, 18 Smedes & Marshall, 474, 479.

tile by which it has been made, is a circumstance of great importance, as serving to distinguish a suicidal from a homicidal wound, (*a*) or, in case of the latter, to indicate the position of the murderer; (*b*) as well as the fact that the shot was fired from within the house where the deceased was found, and not from without, as is pretended. (*c*) Homicidal wounds are most commonly inflicted from behind, or at the side; the murderer choosing such positions in order to avoid observation. But accidental wounds may also be inflicted from behind. (*d*) Marks made by a ball in traversing or striking against other substances, before reaching the body, such as a fence, tree, door or window frame, serve also to distinguish a homicidal wound, as well as the direction from which the shot has been fired. Where the fragments of a glass window through which a fire-arm has been discharged, are found on the outside, it shows that it could not have been fired by a person on the outside of the house. (*e*) Where the ball has passed through the body, an examination of the entrance and exit wounds (which possess different medical characteristics,) serves to determine the direction. (*f*) The perforation made in the clothing will also determine the point of entrance. (*g*)

But the presence or absence of a weapon, with which the wound might have been inflicted, is perhaps the most important circumstance in cases of this kind. If no weapon be found near the body, and the wound is such as to have been speedily fatal, it is strongly presumptive evidence of homicide. (*h*) If a weapon be found near the body, its appear-

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(*a*) 2 Beck's Med. Jur. 118.

(*b*) *State v. Carawan*, Beaufort (N. C.) Superior Court, 1858.

(*c*) *The People v. Videto*, 2 Beck's M. J. 118.

(*d*) Tayl. M. J. 267.

(*e*) *The People v. Videto*, 2 Beck's M. J. 118, 114.

(*f*) *Id.* 119.

(*g*) *State v. Carawan*, *ubi supra*.

(*h*) Tayl. M. J. 199.

ance and position should be attentively considered. In cases of suicide, the pistol is sometimes found firmly grasped in the hand, (*a*) a state which is said to be impossible for a murderer to imitate. (*b*) The appearance of suicide has sometimes been given to murder, by placing the deceased's own pistol near his hand or body. The mode of detecting such a fraud by comparing the weapon with the bullet found in the body, has been alluded to under another head. (*c*)

The blackening of the fingers of the deceased, from the combustion of the powder in the pan of the weapon, is also a characteristic mark of suicide, (*d*) but, as a medical writer has observed, a crafty assassin might have recourse to it, in order to conceal his crime. (*e*) Useful evidence is often obtained from an examination of the projectile itself, whether it be a single ball or several shot or slugs; and the identity of these should be carefully preserved by the medical witness. (*f*) And the examination of foreign substances found in wounds, such as fragments of paper composing the wadding of the charge, has, in more instances than one, led to the identification of the person who had committed the crime. (*g*)

The presence of two or more mortal wounds in various parts of the body has sometimes been regarded as a decisive proof of homicide, on the presumption that an individual, having already inflicted one on himself, has not the strength to produce the second. But, although correct as a general rule, it must be taken with exceptions, and particularly so if the first wound be not of a nature to produce instant

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(*a*) Tayl. M. J. 199. *Id.* 266.

(*b*) *Id.* 199.

(*c*) *Ante*, p. 422.

(*d*) Tayl. M. J. 266. 2 Beck's M. J. 128.

(*e*) *Id. ibid.*

(*f*) Tayl. M. J. 268.

(*g*) *Id.* 200. See *ante*, p. 272.

death. A determined suicide may, in the few moments of existence, repeat the blows on himself. (a)

In regard to *wounds in general* the most important circumstances, as tending to throw light upon the manner of their infliction, are their situation, number, variety and peculiar characteristics.

The *situation* of a wound will sometimes, of itself, exclude the supposition of suicide as its cause; as where it is in a part of the body which the deceased could not himself have possibly reached. In general, wounds which result from accident or suicide are in exposed parts of the body. An incised wound in a concealed or not easily accessible part is presumptive evidence of murder, because this kind of injury could have resulted only from the deliberate use of a weapon. Suicidal wounds, however, are sometimes found in the most unusual situations. (b) It has been remarked that there is no wound which a suicide is capable of inflicting upon himself, which may not be produced by a murderer; but there are many wounds inflicted by a murderer, which, from their situation and other circumstances, a suicide would be incapable of producing on his own person. (c)

As to the *number* of wounds, it may be observed that, in cases of suicide, it most commonly happens that only one wound is seen, namely that which has destroyed life; and the presence of several wounds on a body, or the marks of several attempts around the principal wound, have been considered to furnish presumptive evidence of murder. (d) But, as a medical writer has remarked, inferences of this kind must be

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(a) Orfila's *Lecons*, (1st ed.) vol. 1, p. 717, quoted in 2 Beck's *Med. Jur.* 128, 124. The same author mentions a case where a suicide discharged one pistol into his body, which broke two ribs and wounded the lung, and then went into an adjoining room, obtained another pistol, and discharged it through his head. *Id. ibid.*

(b) Taylor's *Med. Jur.* 190. See the cases mentioned *ibid.*

(c) *Id. ibid.*

(d) *Id.* 194. See 2 Beck's *Med. Jur.* 185.

very cautiously drawn, as suicides have been known to inflict many wounds upon themselves, before succeeding in their purpose. (a) That the presence of two or more mortal wounds in different parts of the body, when inflicted by the same instrument, does not in all cases and invariably justify the conclusion of murder, has just been shown. And even the presence of several wounds, obviously inflicted by *different* means or instruments, does not necessarily exclude the supposition that the death may have been the result of suicide. (b)

That the extraordinary *character* of a wound is not, in its nature, incompatible with the supposition of death by suicide, especially in cases where the deceased is a lunatic, has been remarked by medical jurists. (c)

In determining whether and how far wounds observed upon a dead body have been the cause of death, it is, of course, material to ascertain, at the outset, that they have been inflicted *before* death. This may be effected by a careful attention to the medical characteristics of *post-mortem* wounds, a principal one of which is the small quantity of blood effused. (d)

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(a) Tayl. Med. Jur. 194. In a case of suicide mentioned by Dr. Taylor, there were twenty two wounds found on the front of the chest, besides many on the fore-arm, neck and face. *Id. ibid.* See two other cases where several wounds were inflicted on the throat. *Ibid.* And see 2 Beck's Med. Jur. 135, note, quoting Lauret.

(b) "In general," observes a medical writer, "suicides, when foiled in a first attempt, continue to use the same weapon; but sometimes, after having made a severe incision in the throat, they will shoot themselves, or adopt other methods of self-destruction." Tayl. Med. Jur. 195. A very striking case is quoted by Orfila, on the authority of Olivier D'Angers. A young man discharged a pistol into his mouth, the ball from which fractured the roof, tore the tongue and velum, and dropped from the œsophagus into the stomach. He then endeavored to fracture his skull with the butt-end of the pistol, and inflicted no less than thirty wounds on the front part of his head, most of which penetrated to the bone. Finally he hung himself on a neighboring tree. 2 Beck's Med. Jur. 124, note.

(c) See the cases in Taylor's Med. Jur. 191.

(d) See *Id.* 174, 175, 178, 179.

Supposing it satisfactorily ascertained that the wounds observed were produced *before* death, the next question to be determined will be, whether they were capable of producing death, or whether the death was actually owing to them, and not to some other cause. In regard to the effect of physical injuries, it is to be observed that persons may die from the effect of a *number* of wounds, or even blows or stripes, not one of which, taken alone, could, in medical language, be deemed mortal, as well as from a single mortal wound. (a) "In general," observes a medical writer, there is only *one* real cause of death, although other circumstances may have assisted in bringing about a fatal result. Thus, a person cannot die of disease in the bowels and a stab in the chest, at the same time; nor of apoplexy from disease and compression of the spinal marrow, at the same instant. In most cases of local injury, where a person dies speedily, there will be no great trouble in settling whether disease or the injury was the cause. A difficulty may, however, exist where a person has recovered from the first effects of a wound, and has subsequently died. Besides, there may be cases in which the cause of death, in spite of the most careful deliberation, will be still obscure; or sometimes it may happen that the death of a party appears to have been as much dependent on bodily disease, as on an injury proved to have been received at the time he was laboring under disease." (b) The evidences and considerations by which medical witnesses should be governed in forming and expressing their opinions in such cases, are sufficiently stated in the works on medical jurisprudence which have already been referred to. (c)

Where several wounds are found on a dead body, especially if of different kinds and obviously inflicted by different

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(a) Taylor's Med. Jur. 211.

(b) *Id.* 208.

(c) See 2 Beck's Med. Jur. chap. 15. Taylor's Med. Jur. chap. 26.

means, it is sometimes material to ascertain which was *first* received. It is said to be fair ground for a strong suspicion of homicide, when, besides marks of great injury to the head, a severe cut or stab is found on the body. A man is not likely to cut or stab himself after having sustained such severe violence to the head; but it is quite possible that he may have the power of precipitating himself from an elevated spot, and thereby producing great injury to the head, after having previously attempted to cut his throat, or to stab himself. (a)

In connexion with wounds, marks of *blood* on the dead body, and its clothing, are sometimes of great importance as indicia of criminal agency. In an English case which has already been referred to, (b) the presence of another person was conclusively shown by the mark of a bloody *left* hand on the *left* arm of the deceased.

Where, instead of wounds properly so called, or in addition to them, what are popularly termed *bruises* or discolorations of the skin are observed upon the body, (constituting the appearances called, in medical language, *ecchymosis* and *sugillation*, (c)) the causes of such marks become a very important part of the general inquiry into the cause of the death. It is well known that these appearances are not only the natural results of blows or violent compression applied to the body, but that they sometimes occur as natural accompaniments or consequences of death from other causes. (d)

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(a) See further, on this head, Taylor's Med. Jur. 195.

(b) Case of *Mary Norkott* and others, 14 State Trials, 1324.

(c) The term "*ecchymosis*," (signifying an effusion of blood under the skin,) is applied to those discolorations which are the effects of injuries, whether accidental or intentional, received during life. The term "*sugillation*" is applied to those livid spots which are noticed on the bodies of the dead, generally after they become stiff and cold; and usually in the most depending parts. 2 Beck's Med. Jur. 15—17. But this distinction, or the use of any other term than *ecchymosis*, has been considered unnecessary. Taylor's Med. Jur. 181.

(d) See 2 Beck's Med. Jur. 14—21. Taylor's Med. Jur. 176—184.

It sometimes happens that discolorations or ecchymosis observed upon a dead body will assume a form indicative of the means by which the violence was offered. In cases of death by hanging, the impression caused by the cord on the neck is sometimes ecchymosed, and indicates its course with precision. And in cases of death by strangulation, where the fingers have been violently applied to the throat, the indentations produced may serve to point out the manner in which life was destroyed. (a) The marks of finger-nails around the mouth, serve to indicate the presence of an assassin, by showing a forcible attempt to close the mouth, so as to prevent an alarm from being given. (b)

*Burns*, constitute another class of appearances upon dead bodies, which are, in general, readily distinguishable from all other injuries. Where no other appearances are observable, it rarely happens that they are attributable to any other cause than accident. It may be said that suicide is never attempted by applying fire directly to the body. And perhaps the same may be said of murder. (c) But it frequently happens that burning is resorted to, after the commission of the murder, either for the purpose of disguising the crime, by giving it the appearance of accident, as where the clothing (d) or bed of the murdered person is set on fire; or as a means of obliterating all evidence of the crime, as where the building in which the dead body is left is fired, with a view to its total destruction. Where these attempts are unsuccessful, or where, upon the unconsumed portions of the body, are found marks of violence, such as

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(a) Taylor's Med. Jur. 178.

(b) *Id.* 208. Marks of this kind were observed in the late French case of the Duchess of Praslin, (August, 1817.)

(c) 2 Beck's Med. Jur. 94, note. But see the case mentioned *ibid.* In those cases where the inmates of a house are destroyed during sleep, by firing the house, the suffocation produced by the smoke is usually the immediate agent of destruction.

(d) See the case mentioned in 2 Beck's Med. Jur. 86, note.



wounds and fractures, it furnishes one of the strongest indications of murder. (*a*)

The medical criteria for distinguishing burns inflicted during life, from those produced after death, will be found under the proper head in the works on medical jurisprudence which have already been quoted. (*b*)

In the cases of death which have hitherto been considered, the body has been supposed to be found either resting *on* the ground (or floor,) or concealed *under* it. There are two other modes of disposition which remain to be noticed; namely, where the body is found hanging *above* the ground, and where it is found in *water*. (*c*)

Death by *hanging*, as it implies a degree of deliberate preparation in the procurement and adjustment of the cord or other means of suspension, is very rarely the result of accident. (*d*) And, from its obvious difficulty, it is equally rare that a murderer selects this mode of destroying life. (*e*) It is, however, frequently adopted by suicides; (*f*) and hence becomes a means of simulating suicide, which

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(*a*) See *Taylor's* case, given *Id.* 228, 230. It is generally a matter of great difficulty to destroy these traces of violence, when they occur in the shape of fractures of the bony portions, especially of the skull. Dr. *Beck* mentions a case in Maryland, a few years since, where a ruffian murdered a whole family, and then fired the log-house in which they lived. On the body of the father, however, a fracture of the skull was found; and, in consequence of a bed from the upper room falling on the mother, her body was so far uninjured as to exhibit three incised wounds, one of them penetrating the stomach. 2 Med. Jur. 86.

(*b*) See 2 Beck's Med. Jur. 86—98. Tayl. Med. Jur. 273—277. Wharton & Stillé's Med. Jur. 587—589, §§ 867—869.

(*c*) For the appearances observed on the bodies of persons found suffocated and strangled, see 2 Beck's M. J. 206, 230. Tayl. Med. Jur. 511. 520. Wharton & Stillé's M. J. 605, 612; §§ 893, 899.

(*d*) But see two cases mentioned in Tayl. M. J. 501

(*e*) 2 Beck's M. J. 186. Dr. *Beck* mentions an English case in which a murder was committed in this way, and a Scotch case in which it was attempted. *Id.* 189, 190.

(*f*) Cases have occurred in which it has been voluntarily resorted to, after the infliction of severe injuries by other means. *Id.* 124, note.

may be resorted to by a murderer, for the purpose of concealing his crime.

In every suspected case of death by this means, two questions may present themselves for solution by the medical witness: first, was the body of the deceased suspended before or after death; or, in other words, has he been previously killed in some other way, and then placed in this situation to avoid suspicion: secondly, did the deceased hang himself or was he hung by another? (*a*)

Medical writers have enumerated the appearances on bodies hung during life, (*b*) such as marks of the cord upon the neck, the congested appearance of the face, and the state of the genital organs; but as most of these are found to be produced in cases of suspension after death, especially immediately after, they cannot, it would seem, be uniformly and implicitly relied on. But circumstantial evidence has, more than once, assisted in clearing up a doubtful case. On removing the body of a man who was found hanging, the rope was observed to be clotted with blood. This simple circumstance led to further investigation, by which it was discovered that the person had been murdered, and his body afterwards suspended. (*c*) The presence of marks on the neck, indicative of strangulation, such as the cord was not likely to have produced, may lead to a suspicion that the hanging followed death. (*d*)

If wounds of a decidedly mortal nature be found upon the body, the presumption of murder amounts almost to positive certainty; for who but a murderer, it is asked, would suspend the dead body of a person so wounded, immediately after death? (*e*) But, with these exceptions, the existence

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(*a*) 2 Beck's Med. Jur. 181. 186.

(*b*) *Id.* 167. 181. Taylor's Med. Jur. 492—495. Wharton & Stillé's M. Jur. 621—625, §§ 909—914.

(*c*) Tayl. M. J. 498.

(*d*) *Id. ibid.* See the cases *ibid.*

(*e*) *Id.* 501.

of wounds or other injuries, even of a serious character, does not necessarily establish the fact of homicide, since persons are capable of making many attempts on their own lives, by various means. (a) And marks of violence on a hanged subject may, in some cases, be fairly ascribed to accident, or natural causes. (b)

If it be ascertained that the body was suspended during life, the principal question will be, whether the act was the result of suicide or homicide. The difficulty of committing homicide by suspension is so apparent, that the discovery of a person hanging is said to afford *primâ facie* evidence of suicide. (c) Still, murder may be committed by this means as actual cases have attested. (d) But, unless the subject has labored under stupefaction, intoxication or great bodily weakness, "we must expect, in homicidal hanging," observes a medical jurist, (e) "that there will be evident marks of violence about the body," arising from the resistance which would naturally be offered in such cases. In addition to the evidences afforded by such appearances, the following circumstances should be carefully ascertained; namely, whether the doors and windows of the apartment in which the body is found, be secured on the inside or on the outside; whether the furniture be disordered or otherwise; whether the dress of the deceased be at all torn or discomposed, or his hair dishevelled; whether the rope, cord or other instrument of suspension, correspond with the impression seen around the neck; and whether it be of sufficient strength to support the body. (f) The substance of which the instrument is made, and the manner in which it is ap-

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(a) Taylor's Med. Jur. 499.

(b) *Id. ibid.* As to the discolorations (sugillations) which take place on bodies after death, see 2 Beck's Med. Jur. 16.

(c) Tayl. M. J. 501.

(d) See *ante*, p. 708, note (e).

(e) Tayl. M. J. 502.

(f) *Id.* 501. 2 Beck's M. J. 189.

plied to the neck, and secured to the point of suspension, may also be of importance, as indicating the source from which it was obtained, and the agency by which it has been adjusted. (a)

The *position* of the body has sometimes been considered as a means of distinguishing suicidal from homicidal hanging. But accurate observation has shown that it cannot be relied upon. (b) So, the circumstance that the hands or feet, especially the former, are found *tied*, has been thought to indicate homicide. But this, also, has been found to exist in cases of undoubted suicidal hanging, even in the difficult form of tying the hands together *behind the back*. (c) If however, the ligatures be obviously such as a person could not possibly have put upon himself, or if the position from which he is found suspended, is one which he could not have reached with his hands tied in any form, the presumption of homicide will be conclusive. (d)

Death by *drowning* is frequently the result of suicidal design, as well as accident. It is also sometimes produced by criminal violence, as where one person is designedly thrust by another into the water, under circumstances which prevent his extricating himself. But, in cases where the agency of another has existed, it more commonly happens

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(a) See the case of *The State v. Avery*, before the Supreme Court of Rhode Island, May, 1833; in which both these facts were made the subject of minute inquiry. This case is particularly considered by Dr. Beck. 2 Beck's Med. Jur. 197—201.

(b) Tayl. M. J. 504, 505. Whart. & Stillé's M. J. 626, 627, §§ 916—918.

(c) Tayl. M. J. 505, 506. Robinson's case, given in Whart. & Stillé's M. J. 628, § 920

(d) *Id.* § 919. In connexion with the use of the hands, in cases of hanging, it may be observed, that, in the case of the *State v. Avery*, where the deceased was found hanging, with her toes touching the ground and her knees approaching it, her arms being under her cloak, which was hooked together nearly its whole length, the clothes of the deceased, as she hung, were found *smoothed back* as far as they would reach, under her legs. This fact was relied on for the prosecution as an evidence that she must have been hung by, or with the assistance of another person.

that bodies are thrown into the water, after death by other means, in order to produce an appearance of accident or suicide, and, in that way, to avert suspicion from the criminal.

Where a body has been found in the water, the first question to be determined by a medical inquirer and witness, is, whether the person *died in* the water, and from its effects, or whether he was *dead* when thrown in. (a)

The particular appearances observed in cases of death by drowning, (that is, from the effect of the water upon the living body immersed in it,) and which have been regarded as indicative of death from that cause, may be found enumerated in the medical works which have already been referred to. (b) The most important of these, only, will now be mentioned.

The signs upon which medical jurists chiefly rely, as proof of death from drowning, are, the presence of froth in the lungs, or in the trachea and air-passages, water in the lungs, and water in the stomach. (c)

The interior of the trachea, in a drowned subject, is frequently covered with a watery or mucous *froth*; and this is stated to have been, in some instances, so abundant as to have filled the air-tubes and their ramifications. (d) The presence of this appearance, when the body is recently inspected, is commonly regarded as a positive and conclusive sign of death by drowning. (e) But it is not a uniform sign or accompaniment of death by that means; for experiments have shown that, in certain cases of drowning, it is not found. Hence the absence of froth in the parts described, cannot be assigned as a proof that the person did not die from drowning. (f)

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(a) 2 Beck's Med. Jur. 238.

(b) See *Id.* 239. 240—256. Tayl. M. J. 472.

(c) *Id.* 472—474. 2 Beck's M. J. 246, 249, 252.

(d) Tayl. M. J. 473.

(e) *Id.* 474. Whart. & Stillé's M. J. 641, § 935.

(f) *Id. ibid.*

Water is also found in the *lungs* of drowned persons. But this circumstance cannot always be relied on as evidence that it was taken in while the person was drowning, since it is not of uniform occurrence. (a) And besides, it is now well known that it is possible for water to penetrate to the lungs, where a body has been thrown in dead. (b) But this, it seems, can happen only where the body has been thrown in recently, and lies in a position favorable to the ingress of water. (c) On the other hand, the absence of water from the lungs of the subject found apparently drowned must not be considered to indicate that death was not a consequence of drowning, as the water may have drained away, or disappeared from other causes. (d)

Water is also, generally, though not uniformly taken into the *stomach*, or swallowed, by persons who die from drowning. (e) But it is now established that water does not enter the stomach after *death*, unless putrefaction is considerably advanced. (f) Hence the conclusion is warranted that, if the water in the stomach can be recognized as identical with that in which the body is found, (unless it was drunk previous to submersion,) it must have been swallowed by the person before death. (g) This may be proved by the circumstance that it contains substances similar to those observed in the pond or stream in which the drowning occurred, such as mud, straw, grass, duck-weed and the like. (h) But the absence of water from the stomach cannot justify the inference that the person has not died by

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(a) Taylor's Med. Jur. 639, § 983. Dr. Taylor observes that it is an appearance only occasionally met with. Med. Jur. 474.

(b) *Id. ibid.*

(c) Whart. & Stillé's M. J. 640, § 983.

(d) *Id. ibid.*

(e) Taylor's Med. Jur. 473.

(f) Whart. & Stillé's M. J. 642, § 983

(g) 2 Beck's M. J. 254.

(h) Tayl. M. J. 473.

drowning, because in some instances it is not swallowed, and in others it may drain away and be lost after death. (a)

In addition to the indications which have just been mentioned, the following circumstances are important. If substances are found grasped within the hands of the deceased, which have evidently been torn from the bank of a canal or river, or from the bottom of the water in which the body is found, such as grass, weeds, sand, &c., it is strong presumptive evidence that the death occurred in the water. (b) So, if a dead body be discovered, still holding to a rope, oar or similar object, no further evidence is required to show that the deceased must have died by drowning. (c)

The principal signs which denote death *previous* to submersion, are, the absence of water or foreign substances from the trachea or stomach, and the presence of injuries which could not be inflicted under water, such as the mark of a cord round the neck, wounds from fire-arms, or the traces of poisons. (d) In regard to the absence of water, it has already been observed that it is by no means a uniform circumstance. And in regard to marks of violence, it should be borne in mind, that unless they appear to have been immediately fatal, or such as to have destroyed all power of motion, they may have been occasioned by attempts at suicide before the person succeeded in drowning himself.

Where the body is found with weights attached to it, it may serve to raise a presumption of murder; but this will not be conclusive, for instances have been known where suicides have attached weights to their bodies so as to ensure

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(a) Taylor's Med. Jur. 478.

(b) *Id. ibid.*

(c) *Id.* 472.

(d) 2 Beck's Med. Jur. 240.

death. (a) The same remark will apply in cases where the limbs are secured with ligatures. (b)

Supposing it ascertained that the body was alive when it went into the water, or, in other words, that the person was drowned, the next question to be determined will be, was the drowning the result of suicide, homicide or accident? (c)

Observation has shown that drowning is a mode of death frequently adopted by suicides, (d) and very commonly due to accident, but it is seldom found to have been resorted to by murderers, without the employment of other means. (e) The question just stated can rarely be determined merely from a view of the *post-mortem* appearances, for these are, for the most part, the same in each of the supposed kinds of death. (f) Even wounds and marks of violence upon the body are not, in all cases, decisive; for these may be produced by the mere act of falling into the water, whether the deceased accidentally fell, or suicidally leaped in, or was homicidally thrown in; or they may be accidentally inflicted upon the body afterwards, in consequence of contact with pointed, hard or rough substances in the water. (g) But where the nature of the wounds shows that they must have been inflicted by artificial means, as in the instance of gun-shot wounds, the supposition of accident will be excluded, and the case will then rest between the two suppositions of suicide and homicide. Suicides have been known to inflict severe wounds on themselves, on the brink of the

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(a) Taylor's Med. Jur. 486.

(b) *Id. ibid.*

(c) *Id.* 488. 2 Beck's M. J. 281.

(d) It has been calculated that drowning is the cause of death in nearly one half of all suicides, but this, of course, will vary according to localities. Tayl. M. J. 488.

(e) *Id.* 484.

(f) *Id.* 488.

(g) *Id.* 488. Whart. & Stillé's M. J. 648, § 988. 2 Beck's M. J. 282.



water, or even just before precipitating themselves into it, in order to ensure a speedy death; and hence the determination of this question is often difficult, and necessarily dependent on the circumstances proved in each case. (a) "Medically speaking," observes a writer who has already been repeatedly quoted, "the drowning is presumptively suicidal, when there are no marks of violence; and it is presumptively homicidal when severe vital injuries, of a more or less speedily mortal or dangerous character, and not likely to have had an accidental origin, are met with." (b) The rule which the same writer lays down for the observance of medical examiners, is, never to pronounce a positive opinion in favor of homicidal drowning, from violence on the person of the deceased, unless the violence be so situated on the body that it could not have been self-inflicted, and unless it be of a nature to have destroyed life speedily. (c) Ligatures found on the hands and feet of the body, of course, negative the supposition of accident, but often leave the case in doubt between suicide and homicide. (d) Where, however, the ligature is obviously of a kind which could not have been put on by the deceased himself, the case will be placed out of doubt.

In order to assist inquiry in these cases, Dr. *Beck* recommends attention to the following considerations:—whether the stream in which the body is found is rapid or still water, and whether its banks are precipitous or sliding; whether the individual has labored under nearsightedness, vertigo or symptoms of insanity. In some cases, accidental circumstances may clear up the subject; as the marks of footsteps on the margin of the water, and substances found grasped in the hands of the deceased. (e)

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(a) Taylor's Med. Jur. 483.

(b) *Id.* 484.

(c) *Id. ibid.*

(d) 2 Beck's M. J. 283, 284. See *supra*.

(e) 2 Beck's M. J. 282. For prominent instances in which appearances of

The last form or mode of death, which remains to be considered (*a*) is that by *poisoning*, the characteristics of which distinguish it, at once, from all those which have been mentioned. Instead of resorting to open violence, the poisoner relies upon the arts of deception and secrecy. He never forcibly applies the destructive agent to the body of the subject, with his own hand, as in other cases; but carefully disguises it under a false appearance, and thereby induces the subject either to apply it, unknowingly, to himself, or to suffer it to be applied, without objection. It is applied, moreover, not to the exterior, like other deadly instruments, but to the interior of the body, where it is lost to view, and is, in many instances, never recovered; and in this secret position it produces its intended effect by its own active qualities, with the least possible amount of visible agency on the part of the criminal.

The operation of poison, though sometimes very rapid, and even almost instantaneous, is more commonly extended over a considerable length of time, and occasionally over a long space. (*b*) In many cases, its effects, during life, are with difficulty distinguished from those of natural disease; (*c*) and where disease may have actually existed at the time of its administration, this difficulty is vastly increased. (*d*) Hence, as already observed, the existence of

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supposed violence on the body, and the absence of water in the stomach, were relied on as evidences of homicide, see the case of *Philip Standfield*, 11 State Trials, 1371; and that of *Spencer Cowper*, 13 *Id.* 1177; in the former of which, the prisoner was convicted, and, in the latter, acquitted. See also the New York case of *Levi Weeks*, March, 1800. These cases are mentioned and commented on by Dr. Beck. Med. Jur. 209, 273, 278.

(*a*) As to the proof of a *corpus delicti* in cases of infanticide, see Wills, Circ. Evid. 203—208.

(*b*) 2 Beck's Med. Jur. 372.

(*c*) As to the means of distinguishing between the symptoms and effects of poison and those of disease, see *Id.* 392—397. Whart. & Stillé's M. J. 385—390, §§ 505—513.

(*d*) 2 Beck's M. J. 382. As to the means of distinguishing in such cases, see *Id. ibid.*

an infirm state of health is frequently taken advantage of, as a fitting opportunity for the accomplishment of a murderous design by this means. (*a*)

The first question to be determined in all suspected cases, is, whether the deceased died from the effects of disease or of poison. (*b*)

The medical evidence by which the existence of poison, as the cause of a known death, is established, is furnished by circumstances of three kinds, namely, the symptoms observed on the living body, (*c*) the appearances presented on a *post-mortem* examination, (*d*) and the actual detection of poison in the stomach or intestines, by a chemical analysis of their contents. (*e*) To this may be added the evidence derived from physical and moral facts of a general character, which is always of the greatest value, and sometimes proves decisive of the case.

The discovery of poison in the body, by actual chemical examination, and its identification by name as a known substance, (especially if it be found identical with a poison discovered in the food or medicine of which the deceased had partaken,) is, of course, conclusive as to the particular means employed, and is, in itself, a fact of the highest importance. (*f*) "Upon general principles," observes a judicious

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(*a*) See *ante*, p. 392.

(*b*) *Abbott, J. in Rex v. Donnell*, Wills, Circ. Evid. 187.

(*c*) See 2 Beck's M. J. 374.

(*d*) See *Id.* 397.

(*e*) The consideration of these subjects occupies a very large space in most works on medical jurisprudence, including a view of the various known poisons, their ascertained effects upon the human body, the quantities necessary to destroy life, and the chemical tests by which their presence may be detected. See Taylor's Med. Jur. 33—168. 2 Beck's M. J. 367—394. Wharton & Stillé's M. J. 377—538, book 5, part I.

(*f*) See 2 Beck's M. J. 417. For instances in which the existence of poison in the body was most accurately determined by chemical analysis, see the cases of *Rex v. Burdock*, Bristol Summer Assizes, 1835; and *Regina v. Turrell*, Aylesbury Spring Assizes, 1845. Wills, Circ. Evid. 196—203.

writer, "it cannot be doubted that courts of law would require chemical evidence of poisoning, wherever it were attainable, and in that case, it would seem but reasonable, in analogy to the general rules of evidence, that it should be of the highest character which the nature of the case admits; at least, a conviction cannot be satisfactory, if it be grounded upon evidence of an inferior nature, when evidence of a more satisfactory character is capable of being adduced." (a) But chemical evidence is not always attainable; nor is it so essential that a case may not be satisfactorily determined without it. (b) If the jury are satisfied from the whole evidence adduced,—the symptoms observed during life, and the appearances presented after death, as reported by the medical witnesses, in connection with other physical and moral circumstances,—that the death was occasioned by poison, it will be sufficient to ground a conviction. (c) And it has been observed that the fact that poison was administered can be satisfactorily shown by proof of the potion being given, though there be no *post-mortem* examination at all. (d)

Supposing poison to be satisfactorily made out as the means or instrument of death, the next inquiry will be, *how*, and *by whose agency*, it came to be introduced into the body? In determining this, the same counter-possibilities are to be taken into view as in cases of death by the means which have already been considered; namely, those of accident and suicide, as well as the criminal agency of another. The deceased may have taken the poison, without the intervention of any other person; either by accident, in consequence of mistaking it for another substance, or with a suicidal design of destroying life. Instances of death from

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(a) Wills, Circ. Evid. 181.

(b) Whart. & Stillé's M. J. 707, § 1068.

(c) See the observations of Parke, B. in charging the jury, in *Rex v. Tawell*, *ubi supra*.

(d) Whart. & Stillé's M. J. *ubi supra*.

both these causes are of constant occurrence. Or, if clearly proved to have been administered by another, it may have been done through mistake, or from ignorance or erroneous estimate of the properties and effects of the substance administered.

Whether poisoning has been the result of suicide or homicide, is often a very difficult question, and is to be determined by moral considerations almost exclusively ; (a) such as the previous state of the mind of the deceased, his situation and circumstances ; his manner and conduct during the illness produced by the poison, and his relation to, or connection with others who may have had an interest in his death. (b) Physical circumstances, however, are sometimes found to render important aid in determining the question ; such as the position of the body, and of objects near it or in contact with it. In cases where a liquid (such as prussic acid,) ascertained to have been swallowed by the deceased, is of so deadly a nature as to be capable of almost instantly destroying life, it has been supposed that the circumstances of the phial from which it has been drunk, being found *corked*, by the side of the bed on which the body lies, and of the bed-clothes being carefully drawn up about the person, went, of themselves, to exclude the supposition of suicide ; on the ground that the individual would not, after taking the poison, have the power to make such a disposition of the articles with his own hands. But the existence of such power, though highly improbable, has been admitted by medical witnesses to be possible. (c) The finding of a part of the poison in the room or in the pockets of the deceased, is considered a very equivocal proof of suicide, since it may quite as easily be put there by others as by himself. But the finding of a writing, left by him, to express his last wishes,

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(a) 2 Beck's Med. Jur. 890.

(b) *Id.* quoting Foderé, vol. 4, p. 248.

(c) See Wills, Circ. Evid. 174.

or to explain the reason of the act (and which may be classed among physical as well as moral circumstances,) as it is the most common, so it is also the most certain proof of self-destruction. (a)

In many cases of criminal charges, the evidence which serves to prove the *corpus delicti*, is composed of a different class of facts from those which serve to identify the particular criminal agent; so that the proof may, without much difficulty, be divided into two successive stages, corresponding with these two leading facts. But in cases of poisoning, this distinction or separation does not often exist; and it is rarely possible to obtain proof of a *corpus delicti*, without resorting to evidence of moral conduct and circumstances, on the part of the individual who is charged with the crime; (b) such as previous allusions to the death of the deceased as an event likely to happen, the possession of a poison similar to that proved to have been taken, or of the means of preparing such a poison, and acts of suppression or destruction of evidence, after the death had occurred. This was well illustrated by the case of *Donellan*, which has already been examined. (c)

But whether a *corpus delicti* be capable of proof on a distinct ground, or not, it will be found that in the application of the evidentiary facts to charges of poisoning, the same great fundamental principle of circumstantial evidence is as strictly adhered to, as in the process of identifying the criminal. No single fact is taken as conclusive evidence of guilt itself, but the opinion of the jury is made up from a view of *all* the facts, taken *together*. (d) And this

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(a) 2 Beck's M. J. 891.

(b) See Wills, Circ. Evid. 192.

(c) See *ante*, pp. 608—620.

(d) In the Pennsylvania case of *Commonwealth v. Chapman*, one of the medical witnesses declared that his own opinion, that the death of the deceased had been caused by poison, was made up from the amount of moral probabilities in the case, any one proof not being sufficient. *Celebrated Trials*, 365.

may be laid down as a rule of general application to all cases of crime, where the evidence is not of that cogent description known as *certain*, which, by its own force, necessarily excludes all conclusions but one. (a)

## II. *Corpus Delicti* in other Crimes.

The proof of a *corpus delicti* in other cases than those of homicide, involves the consideration of a much smaller number of particulars, and may be conveniently disposed of under a single head.

In *arson*, the *corpus delicti* consists essentially of the fact that the subject,—the building burned—was intentionally fired by some responsible agent. The facts which constitute its basis,—namely, those of a burning, and the identification of the particular building,—are always easily proved, and never (as in cases of homicide,) raise a question. But the fact of burning is always liable to the possibilities and consequent suppositions of accident and natural causes; which must be satisfactorily excluded before the proof of a *corpus delicti* can be considered as complete. This may be done by means of facts independent of those which go to criminate the accused. As where the fire is extinguished soon enough to show the means and materials of combustion, arranged in a manner precluding any other supposition than that of design. Or, where the burning has been so complete that no traces of the means are left, the fact of design may be proved by circumstances going to exclude the possibility of the existence of other causes. As where the building was wholly unoccupied at the time; or where all means of communicating fire were habitually excluded from it; as where no fires, lights or lighted sub-

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(a) As where a wound is found to have been inflicted on the body, in such a manner and upon such a part as to exclude at once both the suppositions of accident and suicide; thus completing the proof of a *corpus delicti*, without any further evidence. See *ante*, pp. 692, 708.

stances were kept or allowed to be used in it. (a) Or where the fire was seen to break out in different parts of the building at the same moment. Or the same fact may be shown by evidence that a person (not yet identified as the accused,) was seen to enter or leave the building, after it had been closed, or while it was unoccupied, shortly before or about the time when the fire was discovered. (b)

In *rape*, the *corpus delicti* consists of the fact that the person of the complaining party has been forcibly violated. The facts which go to show the commission of this offence, as distinguished from those which connect the accused with it, as the perpetrator, consist of appearances on the person and clothing of the female, a description of which may be found in the works on medical jurisprudence already quoted. (c) The counter-possibilities which require to be excluded in these cases, are, that the appearances observed may be the result of fraudulent fabrication, or of disease: the tests for determining which may also be found in the works just referred to. (d)

In *burglary*, the evidence of a *corpus delicti*, or the fact that the building has been burglariously entered by some one, as distinguished from that of those which serve to identify the offender, consists of the marks of violence observed upon the doors, windows, &c. or of the removal (without physical fracture,) of the usual securities, and of displacement and disorder among articles in the interior, as indicating a forcible entry. The possibility of accident, as

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(a) The possibility of the spontaneous combustion of articles kept or stored in the building, and of the communication of fire by the agency of animals, such as rats and mice, should, of course, be taken into view.

(b) It is remarked by a Scotch writer, that the proof of the *corpus delicti* in wilful fire-raising, is generally mixed up with that which goes to fix guilt upon the prisoner. Alison's Princ. of the Crim. Law of Scotland, 444; cited in Roscoe's Crim. Evid. 276.

(c) See Taylor's Med. Jur. 448—458. Wharton & Stillé's M. J. 826—858, §§ 426—472. 1 Beck's Med. Jur. chap. 5.

(d) *Id. ibid.*



the cause of these appearances, is, from the nature of the case, almost necessarily excluded. And the only counter-possibility material to be considered is, whether these marks may not have been simulated or fabricated by some inmate or occupant of the building ; as has occurred in some cases of murder and robbery, where the criminal has adopted this course, in order to avert suspicion. (a) The peculiar appearances which the marks in such cases, are, on a close examination found to present, and the absence of all traces of the presence and movement of persons on the outside of the building, generally serve to expose such frauds with effect. (b)

In *robbery* and *larceny*, the essence of the *corpus delicti* is that the property claimed to have been stolen has been feloniously taken out of the prosecutor's possession. Supposing the property to be simply missed by the owner, the case is open to the supposition of several counter-possibilities. Thus, it may have been the result of accident, as where it has been *lost*, in the ordinary sense of the word, that is, (in the case of an inanimate object,) casually dropped from the person. Or it may have been the result of the act of the owner himself ; as where it has been mislaid and forgotten. And, in both these cases, there may be no transfer of possession to any human being, (the article remaining where it was dropped or laid ;) and, in the last case, not even a removal out of the owner's possession. (c) Again, if actually transferred to the possession of another, it may have been through accident, (the possession also being an unconscious one ;) as where it has been effected by the agency of an animal, or in consequence of the article adhering closely, and in such a way as to escape observation, to another article intentionally transferred. Lastly, supposing a tak-

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(a) See the case of *Regina v. Courvoisier*, cited, *ante*, pp. 423, 424.

(b) See the same case.

(c) See the case of *Rex v. Carter*, *ante*, p. 654.

ing or possession by another, the article may have been honestly found, or it may have been unintentionally taken through mistake ; or taken, if intentionally, under some claim of right, or for some innocent purpose ; and thus may be satisfactorily proved to have been no robbery or larceny at all. (a)

It is not always (or, rather it is rarely) possible to prove the general fact of a felonious *removal out of the possession* of the owner or claimant of the property, with much distinctness from the particular fact of a *felonious acquisition* by the individual who is accused. But some evidence of such preliminary fact is always required. Thus, on an indictment, in England, for stealing a horse, the prosecutor proved that he had put the horse, to be agisted, with a person who resided twelve miles distant from his own residence, and, in consequence of hearing of its loss from that person, he went to the field where the horse had been put, and discovered that it was gone. But *Gurney*, B. was of opinion that the loss should be proved more distinctly ; because *non constat* but the prisoner might have obtained possession of the horse honestly. He could not see how the court could get at that, without the person with whom it was put to agist, or his servant. It was perfectly consistent with what had been proved, that the horse might have got out of the person's possession in some other way, and not by felony. (b) So, where, on a similar indictment, it appeared that a servant was sent to turn out a horse in a field, and was sent to fetch it up again the next morning, when it was missed ; but the servant was not called as a witness, and the prisoner was found in possession of the horse the next day ; it was held that there was not sufficient proof given of the loss, and that the servant ought to have been called to prove what he did with the horse ; as, for anything that appeared

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(a) And see further on this head, *ante*, p. 561.

(b) *Rex v. Yend*, 6 Carr. & P. 176.

to the contrary, the servant might have delivered the horse to the prisoner. (a) The same views have been held in some American cases. (b)

In *forgery*, the *corpus delicti* consists of the fact that the writing produced and exhibited on the trial, is *a forged* writing, or, in other words, that it is not the writing of the party by whom it purports to have been made, or that it is not the writing of any real person at all. (c) In the former case, the forgery may be proved by the testimony of the party himself; but the rule on this point is not uniform. (d) In the latter it is proved by showing that no such person exists. (e)

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(a) *Rex v. Fellows*, MS. 2 Russell on Crimes, (by Greaves,) 122.

(b) *Tyner v. The State*, 5 Humphreys, 383. *Carey v. The State*, 7 Id. 499.

(c) 2 Stark. Ev. 575. Roscoe's Crim. Evid. 508.

(d) This is now the rule in England, by statute 9 Geo. IV. c. 32. s. 2; previous to which, the party was held to be an incompetent witness. Roscoe's Crim. Evid. 141. 2 Stark. Evid. 588. 2 Russell on Crimes, 392, (Phil. ed. 1853.) In Connecticut and in North and South Carolina, the rule is the same as in England before the statute. *The State v. Bronson*, 1 Root, 307. *The State v. Blodgett*, Id. 534. *The State v. Hamilton*, 2 Hayw. 288. *The State v. Stanton*, 1 Iredell, 424. *The State v. Whitten*, 1 Hill, 100. In Maine, New Hampshire, Vermont, Massachusetts, Pennsylvania, and Ohio, the rule is in favor of the party's competency as a witness. *The State v. Shurtliff*, 18 Maine, (6 Shepley,) 368. *Furber v. Hilliard*, 2 N. Hamp. 481. *The State v. Phelps*, 11 Vermont, 116. *Commonwealth v. Hutchinson*, 1 Mass. 7. *Commonwealth v. Snell*, 8 Id. 84. *Commonwealth v. Peck*, 1 Metcalf, 428. *Pennsylvania v. Farrell*, Addison, 246. *Respublica v. Keating*, 1 Dallas, 110. *Respublica v. Ross*, 2 Id. 239. S. C. 2 Yeates, 1. *Resp. v. Smith*, and *Resp. v. Sheppard*, cited 2 Dallas, 240. S. C. 2 Yeates, 4. *Simmons v. The State*, 6 & 7 Ohio, (Hammond,) 288. In New York, the Supreme Court, in 1794, adopted the English rule. But in *The People v. Howell*, 4 Johnson, 296, the propriety of the rule was questioned, and it may now be considered as settled in favour of the party's competency. *The People v. Dean*, 6 Cowen, 27.

(e) 2 Stark. Evid. 575.

## CHAPTER III.

### RULES OF CIRCUMSTANTIAL EVIDENCE, GIVEN AS RESULTS OF THE PRECEDING VIEWS.

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FROM the views which have been presented in the preceding pages, of the nature and operation of circumstantial evidence, the fundamental *principles* upon which it is applied to the development of the truth of criminal charges, will have been sufficiently understood, without the necessity of any further statement or formal repetition of them. But the *rules* which have, from time to time, been established or recognized by the courts, for controlling and limiting its application in practice, with the view of avoiding the errors to which, as a medium of proof, it had, from experience, been found to be liable, may now be summarily and more distinctly stated in the form of general results, as an appropriate conclusion to the whole work.

These rules may be conveniently arranged under four divisions: first, general and preliminary rules; secondly, rules regulating the formation of the basis of fact, from which the inference of guilt is to be drawn; thirdly, rules of inference from the basis of fact as established; and lastly, rules for securing correctness in the final and general conclusion.

## SECTION I.

## GENERAL AND PRELIMINARY RULES OF EVIDENCE.

## RULE I.

*The onus of proving every thing essential to the establishment of the charge against the accused, lies on the prosecutor. (a)*

This rule has been otherwise stated thus:—"The burthen of proof is always on the party who asserts the existence of any fact which infers legal accountability." (b) It is a universal rule of evidence, founded on the most obvious principles of justice and policy, and derived from the great fundamental maxim of law, that every person must be presumed innocent until *proved* to be guilty. (c)

The learned writer in whose words this rule has been given, in commenting upon it, observes, that "it is, in general, sufficient to prove a *primâ facie* case;" (d) and quotes the remark of *Beccaria*, that "imperfect proofs from which the accused might clear himself, and does not, become perfect." (e) This is presenting the rule in its preliminary character of prescribing the *foundation* of the proof to be made in the case. Undoubtedly, the non-production of explanatory evidence, clearly in the power of the accused,

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(a) Best. on Pres. § 200, Rule I. *Rex v. Burdett*, 4 B. & Ald. 140, 149 Theory of Pres. Proof, 57.

(b) Wills, Circ. Evid. 145, Rule II. 1 Greenl. Evid. part 2, c. 8.

(c) Best on Pres. *ubi supra*.

(d) *Id. ibid.*

(e) *Id.* citing *Beccaria*, s. 7, [chap. 14, American translation.]

must weigh against him : and the rule has been stated with this addition by an American writer on criminal law. (a) Where a case, as made out in the first instance, raises a presumption of guilt of a very strong character, and the accused does nothing to remove or weaken it, and it is apparent that, if innocent, he could have done so, the presumption may be allowed to prevail against him. (b) But the rule, in its terms, goes beyond the mere foundation of the proof, by requiring proof to be made of *every thing* essential to the establishment of the charge ; thus placing the case where it undoubtedly ought to rest,—upon the intrinsic strength of the affirmative evidence, rather than on the weakness or absence of evidence to the contrary. “The burden of proof,” as the rule has been stated by a learned judge in an important American case, “lies on the accuser. to make out *the whole case* by substantive evidence.” (c)

“The operation of this rule,” observes an English writer, “may, to a certain extent, be modified by circumstances which create a counter obligation, and shift the *onus probandi*. It follows from the very nature of circumstantial evidence, that, in drawing an inference or conclusion as to the existence of a particular fact, from other facts that are proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. It is therefore a qualification of the rule in question, that, in every case, the *onus probandi* lies on the person who is interested to support his case by a particular fact which lies more particu-

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(a) Wharton's Am. Crim. Law, 847, (ed. 1855.)

(b) See *ante*, p. 165.

(c) Shaw, C. J. in *Commonwealth v. Webster*, Bemis' Report of Trial, 467. And see the opinions of the judges of the King's Bench, in *Rex v. Burdett*, 4 B. & A. 95. See also, the opinion of Shaw, C. J. in *Commonwealth v. Kimball*, 24 Pick. 866, 878

larly within his own knowledge, or of which he is supposed to be cognizant." (a)

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RULE II.

*In all cases, the best evidence must be adduced, which the nature of the case admits. (b)*

This is another general rule, equally applicable to cases of direct and circumstantial evidence; and is a branch of the general principle that the suppression of pertinent evidence, by a party who has it in his power to produce it, raises a presumption against him and throws discredit on the evidence which he offers. (c) It is particularly applicable to circumstantial evidence of the presumptive kind, (d) and has been otherwise expressed in the following terms: "Presumptive evidence ought never to be relied on, when direct testimony is wilfully withheld." (e) It is applicable moreover, not only to the principal fact which is proposed to be proved, but to all the evidentiary facts which may be used as means for that purpose; and hence has been expressively called "the master rule which governs all the subordinate rules." (f)

It is considered as a consequence of this rule, that in all criminal cases, evidence should be received with distrust, whenever any considerable time has elapsed since the com-

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(a) Wills, Circ. Evid. 145, citing the opinions of the judges of the K. B. in *Rex v. Burdett*, *ubi supra*.

(b) Wills, Circ. Evid. 147; Rule III.

(c) *Id. ibid.* Best on Pres. § 214.

(d) See *ante*, p. 225.

(e) Best on Pres. § 214; Rule V. 1 Stark. Evid. 576, [515.] Theory of Pres. Proof, 62. 3 Benth. Jud. Evid. 280. 2 Evans' Pothier, 340.

(f) Wills, Circ. Evid. 148; quoting Burke's Works, vol. 2, p. 618.

mission of the alleged offence. (a) There are, however, several cases on record, in which very satisfactory proof of guilt has been made, after the lapse of long intervals. (b)

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## SECTION II.

**RULES REGULATING THE FORMATION OF THE BASIS OF PROOF,  
OR PRESENTATION OF THE EVIDENCE OF THE FACTS FROM  
WHICH THE INFERENCE OF GUILT IS TO BE DRAWN.**

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### RULE I.

*The facts proposed to be proved must be the genuine facts of the case. (c)*

It is hardly necessary to remark that, in order to the attainment of any true conclusion in matters of evidence, the premises from which it is proposed to be drawn must themselves be true, or free from corruption and error. The two great sources of error to be guarded against, by the judicial investigator, in laying the foundation of his proposed conclusion or verdict, are, first, the wilful *fabrication* of facts, or simulation of physical appearances, by guilty parties, with the express object of misleading the senses and the judgment of observers; and, secondly, the *alterations* which genuine facts of the physical class sometimes undergo,

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(a) *Id. ibid.* Best on Pres. § 200, p. 268.

(b) *Id. ibid.* note (y).

(c) *Ante*, pp. 189, 140. As to genuine facts, see *ante*, pp. 181, 221.



either from pure accident, or from the inadvertent conduct of observers themselves. Both these subjects having already been dwelt upon at considerable length, (*a*) it will only be necessary to add, that fabrication of facts may generally be detected by a rigid scrutiny of the facts themselves, and by a careful comparison of them with other proved facts of the case ; (*b*) and that the alteration of facts may be guarded against, and almost entirely prevented by early, minute and thorough observation of the scene and subject of the crime, with an express view to the giving of evidence, and by the exclusion of the physical objects and appearances discovered, from careless and indiscriminate contact with merely curious observers. (*c*)

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#### RULE II.

*As many of the genuine facts of the case should be presented, as may be possible.*

The importance of presenting to a jury as many of the constituent facts of a case under investigation, as possible, and thereby identifying the case, as shown in evidence, with the case as it actually occurred, has already been sufficiently dwelt upon. (*d*) The absence of facts, and the want of possession of *all* the facts, have also been mentioned as sources of error in the impressions and conclusions both of witnesses and jurors, and as means of frustrating investigation altogether, by preventing the attainment of any conclusion. (*e*) That the probative force of a body of evidentiary facts increases

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(*a*) *Ante*, pp. 181, 140, 238, 420.

(*b*) *Ante*, pp. 142, 148.

(*c*) *Ante*, pp. 140—142.

(*d*) *Ante*, pp. 188, 189

(*e*) *Ante*, pp. 80, 106.

(and that in a progressive ratio,) with the number of the facts proved, has likewise been explained. (a) But the rule is to be taken with the qualification, that where the facts are proved by the testimony of one witness only, addition to the number of facts adds no force to the evidence. (b)

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### RULE III.

*The evidentiary facts must all be proved, and the existence of none of them can be presumed. (c)*

This is a fundamental rule, applying without variation to all the elementary facts of which the basis of the evidence is composed. So far as they are concerned, presumption cannot be made the ground of presumption. This would be extending the principle of induction or inference far beyond its legitimate limits, and lead to an endless multiplication of the sources and chances of error. The juror is allowed, from the necessity of the case, to draw his conclusion from facts, by a presumptive process, but the facts themselves must be *proved* in the strict sense ; that is, they must be shown to be true by the testimony of witnesses under whose observation they have actually and directly fallen. (d) This rule, however, does not prevent the deduction of the *factum probandum*, in the way of inference, from leading facts which have themselves been established by inference from the proved elementary facts of the case.

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(a) *Ante*, pp. 156, 157.

(b) *Theory of Pres. Proof*, 57. *Best on Pres.* § 188.

(c) *Theory of Pres. Proof*, 57. 1 *Stark. Evid.* 502.

(d) See *ante*, pp. 186, 187.

## SECTION III.

**RULES OF INFERENCE, BY WHICH THE FACTUM PROBANDUM IS DEDUCED, IN THE FIRST INSTANCE, FROM THE EVIDENTIARY FACTS PROVED.**

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RULE I.

*There must be clear and unequivocal proof of a Corpus Delicti. (a)*

This rule, the observance of which is indispensable in all criminal cases, is a rule prescribing the order of the process of inference, or of the facts to be inferred, rather than the manner of the process itself. (b) The fact that a crime has been committed being an essential preliminary to the consideration of the fact or proposition that the *accused* committed it, the proof (so far as an actual separation of its elements is practicable, (c)) must be made in a corresponding order. The *corpus delicti* is the first leading fact, the existence of which requires to be established by means of the evidentiary facts proved; and may be considered as occupying an intermediate position between those facts and the great ultimate *factum probandum* of the case. (d) So far as its particular and immediate basis is concerned, it is required, as we have seen, to be proved by direct evidence, or by circumstances of equal power; but the pre-

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(a) Best on Pres. § 201, Rule II. 1 Stark. Evid. 510. Theory of Pres. Proof, 57. Wharton's Am. Crim. Law, 347.

(b) Mr. *Wills*, instead of making this a distinct rule, considers it as a necessary consequence of Rule I, Section I. Circ. Evid. 147.

(c) See *ante*, p. 583.

(d) In another view, it may be considered as constituting a part of the *factum probandum* itself. See *ante*, p. 583

sentation of it, as a complete fact, before the jury, is effected to a great extent by the inferential process. (a)

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### RULE II.

*The facts alleged as the basis of any legal inference, must be strictly and indubitably connected with the factum probandum. (b)*

Mr. *Wills* has given to this rule the prominent position of the first rule of induction from circumstantial evidence. (c) But it rather seems to embody an essential principle of the inductive or inferential process itself. (d) The whole process of presumption is one of *connecting* the evidentiary facts with the principal fact, founded on previously observed connections between facts standing in a similar relation; and so far as this connection fails to be made out, the evidence fails of its intended object. This whole subject has already been considered at length. (e)

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### RULE III.

*The hypothesis of delinquency or guilt should flow naturally from the facts proved, and be consistent with them all. (f)*

By this rule, the attainment of three important objects (all of them indispensable conditions of accuracy in the con-

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(a) See the subject fully considered, *ante*, Section VI.

(b) *Wills*, *Circ. Evid.* 136.

(c) *Id. ibid. et seq.*

(d) Mr. *Best* has not mentioned it among his rules.

(e) See *ante*, pp. 151, 680.

(f) *Best* on Pres. § 212, Rule IV. 1 *Stark. Evid.* 561, 573, [505]. *Theory of Pres. Proof*, 68.

clusion proposed,) is secured ; namely, an examination of all the facts of the case ; an examination of them, free from bias or prejudice ; and an examination of the case on both its sides, or in its aspects of favor as well as disfavor to the accused. Its practical effect is to prevent precipitancy in the inferential process, and to combat what is often the tendency of the mind to jump at conclusions, when under the influence of impressions derived from a few prominent facts, without examining all the facts of the case, and allowing them every interpretation which they will reasonably admit. (a) The process is to be a *natural* one, without the use of any mental violence, in straining facts beyond their real significance, or adapting them, in any degree, to preconceived opinions. (b) By requiring the hypothesis of guilt to be consistent with *all* the facts, the rule secures to the proposed conclusion an essential element of truth, while allowing all due weight to the supposition of possible error ; and prominently recognizes the existence of that *opposite* side (*contrarium*,) which is contemplated and embodied in the great fundamental maxim of presumption from facts. (c) The result of the whole is, that if any of the facts or circumstances established in evidence, be absolutely inconsistent with the hypothesis of the guilt of the accused, that hypothesis cannot be true. (d)

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(a) See *ante*, p. 206.

(b) See *ante*, p. 195.

(c) See *ante*, p. 152.

(d) Best on Pres. § 212. 1 Stark. Evid. 560, 561. [506.]

## SECTION IV.

RULES FOR THE MORE CERTAIN ATTAINMENT OF TRUTH IN  
THE CONCLUSION OR VERDICT, AND FOR THE AVOIDANCE  
OF ERROR AND CONSEQUENT INJUSTICE TO THE ACCUSED.

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RULE I.

*The evidence against the accused must be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offence imputed to him. (a)*

This rule has been otherwise stated in the following terms :  
“ In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.” (b)

This is the great test rule of all presumptive proof ; completing the effect of all the rules which have been mentioned, bringing out the peculiar force of the evidence, and securing its effectual operation in the development of truth in the particular case to which it is applied.

By the last rule of the preceding section, which may be considered immediately preliminary to this, all the elements and conditions for raising and framing a reasonable presumption or hypothesis from facts, are provided for. The hypothesis of guilt is to be compared with the facts proved, and with *all* of them ; and if it be found consistent with them all, and accounts for their existence, it is reasonable to adopt it as *a* true hypothesis.

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(a) Best on Pres. § 210, Rule III. 1 Stark. Evid. 577. [510.]

(b) Wills, Circ. Evid. 149, Rule IV.

But this, however important and necessary a step in the process, is only a preliminary and provisional one. It is known from experience, that the facts of cases are sometimes capable of explanation upon *more than one* hypothesis: or, in other words, that there is more than one hypothesis which will reasonably account for their existence. The great object of the present rule is to ascertain whether such a state of things exists in the case under investigation, and to guard against its possible consequences; and it does this by fixing the grade of the belief or persuasion which is to be the immediate basis of the verdict, and requiring that it shall possess the quality of *moral certainty*. Now, as long as there is a single other hypothesis besides that which the mind, in the first instance, inclines to adopt, which will account for the facts proved, and therefore *may be true*, as well as the first one, it is obvious that this moral certainty, which is in its nature *exclusive*, cannot exist. Under this rule, therefore, other hypotheses besides that which coincides with the *factum probandum*, (that is, other hypotheses proceeding upon the general idea of the innocence of the accused,) must be sought for, and individually compared with all the facts proved, and rejected or excluded, as incompatible with them, before the hypothesis of guilt is to be adopted, and the *factum probandum* held as conclusively proved. (a)

The last rule provided for the consideration of the opposite or defensive side of the case, so far as *proved facts* are concerned, by giving to facts inconsistent with the hypothesis the effect of preventing its adoption in the first instance. But the present rule goes much farther, and provides for a much more thorough and searching exploration of the opposite side of the case, by taking in not only proved facts, but possible *hypotheses* of facts, as elements to be weighed against the affirmative hypothesis, even after it may have been provisionally adopted as true.

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(a) See this process more particularly described, *ante*, pp. 188—192.

## RULE II.

*In cases of doubt, it is safer to acquit than condemn. (a)*

The object and operation of the precoding rule are to fix the degree of strength and impressiveness, which the conclusion arrived at from the evidence, should possess with the jury, by requiring it to be free from any admixture of reasonable doubt in their minds. The present rule goes still farther, and gives express practical effect to the same requisition, by declaring the course which the juror should take, and is bound to take, in case the contingency of reasonable doubt should occur. It is the crowning rule of the whole series, and while it certainly implies and admits the insufficiency of presumptive evidence as a means of detecting and punishing guilt in all cases, (for it doubtless sometimes happens that the fact of guilt may, as an absolute truth, be clear, even in cases of seeming uncertainty,) amply compensates for such disparaging admission, by providing, as far as human rules can provide, against the possibility of such evidence ever being used as a means of oppressing and punishing innocence.

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(a) Best on Pres. § 215, Rule VI. Mr. *Wills*' statement of the rule is much less concise. Circ. Evid. 158, Rule V.





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